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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 648

MARVIN CLEWIS,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

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Opinions Below

The Court of Criminal Appeals of Texas delivered three opinions in this case, none of which appear in the official Reporters. The original opinion was dated October 4, 1965, and appears in the Record at pages 441-445. That Court

delivered another opinion on Appellant's Motion for Rehearing, which was delivered on November 10, 1965 (R. 461-462), and delivered another opinion, called an amended opinion on Appellant's Motion for Rehearing, on January 5, 1966 (R. 472-474). We have been unable to determine why these opinions were withheld from publication.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and Rule 19 (1), Revised Rules of the Supreme Court of the United States. The rights, privileges and immunities set out by and granted to petitioner by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States have been denied.

Questions Presented

Was there a denial of due process of law under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States where a confession of the accused was admitted into evidence in a state criminal proceeding and

(1) That confession was the third in a series of confessions signed after prolonged interrogation and detention, during which time petitioner did not have adequate food or proper rest, was sick and frightened?

(2) The accused was not warned of his right to keep silent or apprised of his right to counsel prior to signing any of the statements?

(3) When, after petitioner had requested that he be allowed to "talk to someone" before signing a confession, the officers summoned the district attorney, who was the only person petitioner was allowed to talk to, other than the officers, before signing the confession admitted in evidence?

(4) The only warnings given to petitioner were given after he had orally confessed, and were given to him in general terms by the interrogating law enforcement officers?

(5) His confessions were the fruits of an unlawful arrest by an officer who had no authority in the investigation and admittedly could not have obtained a warrant for petitioner's arrest?

(6) Petitioner was not afforded counsel at the preliminary hearing, or at any time prior thereto, and counsel was not present at the time the confessions were signed?

(7) The petitioner was not taken before a magistrate for a period of 38 hours following his arrest, and until after he had signed the first confession, and was not thereafter delivered into custody of the proper authorities as required?

(8) The petitioner had been denied the right to see and inspect the first two written confessions, which were not introduced in evidence?

Constitutional and Statutory Provisions Involved

Amendment IV to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . "

Amendment V to the Constitution of the United States:

> "" . . . nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

Amendment VI to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence."

Amendment XIV to the Constitution of the United States:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

Article 212, Vernon's Annotated Texas Code of Criminal Procedure (1925):

> "A peace officer or any person may, without warrant, arrest an offender when the offense is committed in his

presence or within his view, if the offense is one classed as a felony, or as an 'offense against the public peace.' "

Article 213, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate virtually orders the arrest of the offender."

Article 214, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

Article 215, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

Article 217, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

Article 245, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 250, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"If any person appear to prosecute as counsel for the State, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the State or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

Article 251, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."

Article 261, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require."

Article 264, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"A commitment is an order signed by the proper magistrate directing a sheriff to receive and place in jail the person so committed. It will be sufficient if it have the following requisites:

"1. That it run in the name of 'The State of Texas.'

"2. That it be addressed to the sheriff of the county to the jail of which the defendant is committed.

"3. That it state in plain language the offense for which the defendant is committed, and give his name, if it be known, or if unknown, contain an accurate description of the defendant.

"4. That it state to what court and at what time the defendant is to be held to answer.

"5. When the prisoner is sent out of the county where the prosecution arose, the warrant shall state that there is no safe jail in the proper county.

"6. If bail has been granted, the amount of bail shall be stated in the warrant."

Article 265, Vernon's Annotated Texas Code of Criminal Procedure (1925):

> "Every sheriff shall keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner. He may summon a guard of sufficient number, in case it becomes necessary to prevent an escape from jail, or the rescue of a prisoner."

Statement

On May 11, 1964, petitioner's trial for the offense of murder was begun in the District Court of Midland County, Texas. The indictment under which petitioner was tried alleged that he "did then and there voluntarily and with malice aforethought kill Dorothy Mae Clewis by choking her with a belt and in some way or manner, and by some means, instruments and weapons, to the Grand Jurors unknown" (R. 1). The trial consumed six days, and a verdict of guilty was returned by the jury on May 17, 1964, and punishment assessed at confinement in the state penitentiary for a term of twenty-five years (R. 23). At the trial, petitioner contended that the confession introduced in evidence (R. 428-429) was an involuntary statement, which had been secured by means of coercion, threats, physical abuse, and that his will had been overborne.

At the beginning of the trial, petitioner filed a Motion to Exclude and Suppress State's Confessions (R. 6-11), and evidence on this motion was heard by the Court outside of the jury's presence (R. 94-156, 223-225). The state presented rebuttal evidence by its officers (R. 157-223, 225-228).

The constitutional grounds herein presented were relied upon by petitioner in the trial court in his Motion for Instructed Verdict (R. 431-433) and Motion for New Trial (R. 30-36), both of which were overruled by the trial court. Judgment was entered on the jury's verdict (R. 24) and Marvin Clewis was thereafter sentenced in accordance therewith (R. 37).

The facts as developed by the testimony of witnesses at the trial were these:

On Thursday, July 5, 1962, two Latin American boys found the remains of what they believed to be a human body in a shallow grave about two miles north of the city limits of the City of Midland, Texas (R. 40-41). This discovery was reported by them to the sheriff's office, and sheriff's deputies went to the scene and dug from the ground the remains of a human skeleton (R. 41). These remains were then delivered to Dr. Martha Madsen, a local pathologist, who examined them and expressed an opinion that death had occurred from "six weeks to three months" prior to July 5 (R. 46). There was no skin or other matter from which either the deputies or Dr. Madsen could identify the color, sex or features of the skeleton (R. 43-44, 241-242, 244). Both the pathologist and the sheriff's deputies testified at the trial that there was absolutely no way to determine the cause of death (R. 45, 54, 242, 243), and there is no evidence in the record that death was caused by means of any criminal agency. The officers testified (R. 44-45, 54) that a belt found around the neck could have been used to carry the body, rather than as a fatal instrument. Appearing as a witness for the state, Dr. Madsen revised her original opinion, and stated that death "could" have occurred "about six months" prior to discovery (R. 242),

and this new estimate could place the death at about the time Dorothy Mae Clewis was last seen by the witnesses (January 21), which is the date alleged in the indictment (R. 1). Dr. Madsen gave rather vague estimates of the probable height and weight of the person whose bones were found, testifying that the age of that person was "28 to 35" and that this age range is reliable (R. 245). The testimony showed that Dorothy Mae Clewis was 40 years old when she disappeared in 1962 (R. 260), and that she had been married to Marvin Clewis for seven years at that time. The testimony further showed that there was another woman who was missing in Midland at the same time these bones were discovered (R. 378).

Some teeth and gold dentures were found in the skull (R. 50). A plaster cast was made by a local dentist of the dentures (R. 50), and a colored dentist from Waco testified that in 1951 or 1952, he had made the teeth represented by the plaster cast (R. 63). Although he had seen the person he identified as Dorothy Mae Charles only three times (R. 63-64), he nevertheless identified these teeth as those he had made for Dorothy Mae Charles 12 or 13 years previously (R. 65-66).

He testified that he saw an average of "four or five thousand patients a year" (R. 63), and said that all of his records were destroyed in a tornado in 1953 (R. 65), and that he had no records to consult or to present to substantiate his identification (R. 65-66). He testified that the prosecutor had come to Waco—which is more than 300 miles from Midland—on three separate occasions to talk to him about the identification (R. 67). We submit that the bones were not sufficiently identified on this trial as belonging to Dorothy Mae Clewis, and petitioner so contended

in the trial court (R. 431, 437, 33, 35), and in the Court of Criminal Appeals of Texas. These contentions were overruled by both courts.

Aside from his confessions (of which there were three in writing and which were inconsistent and contradictory), there is no evidence in this record which in any way connects petitioner with the crime, if indeed there was a crime. There is, however, evidence from Dorothy Mae's employer that the wife of one Jimmy Davis had made telephone threats against the life of Dorothy Mae Clewis (R. 426). Jimmy Davis was identified by her daughter as one of several men Dorothy Mae was "going with" (R. 82-83). There is further evidence in the record that Dorothy Mae Clewis had taken a considerable amount of money "off a drunk man, 'sleep," and that she was leaving town (R. 320). Another witness testified that Dorothy Mae Clewis had called him on the telephone on two occasions, several weeks after she had disappeared (R. 257-258).

Marvin Clewis continued to look for his wife in Midland and other cities, after she disappeared (R. 80, 333); continued to maintain their apartment, and Dorothy Mae's son by a previous marriage continued to live with him. Dorothy Mae's mother prepared meals for petitioner, testifying that she "fed him for three whole months at my house" until he was transferred from Midland to Borger, Texas, by his employer (R. 332, 333). Although Dorothy Mae's mother, Rachel Garnett, and her daughter, Shirley Jean Judie, testified at the trial that Marvin Clewis had threatened his wife and that they had on occasion had trouble (R. 74, 332), neither of them ever mentioned any of these facts to the police although they had talked with the police on different occasions in an attempt to locate Dorothy Mae

(R. 82, 86, 250, 333). Her daughter said "she had too much responsibility at home to see after it" (R. 82). To the contrary, they testified that Marvin Clewis had continued to search for his wife and to make inquiries about her for several months after her disappearance (R. 80, 333, 334). He was not suspected by them at all (R. 80). Everybody concerned believed that Dorothy Mae Clewis had simply "taken off" with a man, as she had done many times before (R. 70, 82, 254).

Petitioner, at the time the bones were discovered, had worked for more than seven years for the same employer, who testified at the trial that he was a hard-working, dependable employee who told the truth and never got in any trouble (R. 323-326). Deputy Sheriff Gene Howell testified that his reputation as a peaceable, law-abiding citizen was good and that he knew of no law violations (R. 237). He had never been in trouble with the law, and had never been convicted of a felony (R. 283).

Most of the testimony at the trial, other than that referred to above, dealt with three written confessions which were taken by the officers—only one of which was introduced in evidence—and his arrest without a warrant by a city police officer who had not participated at all in the investigation of the case, and whose jurisdiction as an officer did not extend to the place where the body was found. We shall attempt to set out these facts in chronological order, as they appear in the Record.

SATURDAY, JULY 7

Petitioner's whereabouts were well known, and the sheriff's deputies knew that he was working in Borger, Texas, for the same employer for whom he had then worked

for more than seven years. On Saturday, July 7, one of the deputies told petitioner's sister that "if and when" petitioner came to Midland, he would like to talk to him (R. 59). Petitioner's sister talked with petitioner in Borger, by long-distance telephone, when he came in from work that evening, and he left by automobile for Midland—a distance of 300 miles—immediately after talking with her (R. 101, 265). Petitioner voluntarily reported to the sheriff's office about 11:30 P.M. and was questioned by deputy sheriff Kirksey until about 1:30 or 2:00 A.M. Sunday (R. 55, 102). Petitioner was then told that he might leave and go home, but that he should return the following morning about 8:00 A.M. to talk to the sheriff (R. 57).

SUNDAY, JULY 8

At 6:00 A.M. on Sunday, July 8, Marvin Clewis was awakened by Jesus Morales, a city police officer, who took him into custody at the home of Elizabeth Johnson, where he was sleeping (R. 375). Morales testified that he walked in the bedroom and "advised him that I wanted to talk to him . . . at the police station and asked him if he would come along" (R. 157-158). Petitioner testified (R. 103) that Morales told him to "come on and go with him." This offense had occurred outside the city limits of Midland, Texas, at a place admittedly outside the jurisdiction of the Midland Police Department and officer Morales (R. 43, 171, 376). Morales had not participated in the investigation of the case, which had been conducted by the Midland County Sheriff's Department, and no assistance from Morales or the city police had been requested (R. 43, 171, 376). Neither Morales nor any other police officer had said anything about questioning Clewis (R. 58), and Morales

was not in possession of any facts connecting Clewis with the death of Dorothy Mae Clewis (R. 170-171). Morales had no warrant for the arrest of Marvin Clewis (R. 170, 375), and testified that he knew at the time that he did not have sufficient grounds to procure the issuance of a warrant for any such arrest (R. 170-171). At the time Morales arrested Clewis, the bones had not been identified (R. 173, 379), according to Morales, who further testified (R. 172): "I didn't even know that was his wife out there." Nevertheless, Morales took Clewis to the police station, questioned him, took his belongings, and locked him up, thereby placing him under arrest (R. 172). Clewis asked to make a telephone call, but was refused (R. 117). Morales continued to question Clewis throughout the day on Sunday and admitted to questioning him for at least six hours (R. 379). According to Morales, he was trying to get Clewis to sign a polygraph waiver (R. 379). Clewis testified that the officers were also attempting to make him confess that he had murdered his wife (R. 107, 270). Late Sunday afternoon, petitioner's sister, his mother-in-law and Elizabeth Johnson visited with him in the presence of police officers, but he was never permitted to visit with them alone (R. 174, 352, 218, 379, 421). These people visited with Clewis at the instigation of officer Morales and they encouraged him to agree to take a polygraph test (R. 169-170, 379-380). He did sign a polygraph waiver on Sunday night.

Petitioner testified that he had nothing to eat from Saturday before he left Borger for Midland, until the following Tuesday, except for a quart of milk on Monday after he made the first confession about 6:00 P.M. (R. 115, 120, 288). Officer Morales testified that he gave petitioner a sweet roll and some coffee at 6:30 A.M. Sunday when

they arrived at the police station (R. 376-377), which Clewis denied (R. 271). Morales admitted that Clewis had nothing to eat all that day and until he signed the first confession late Monday evening (R. 182-183, 383). Morales testified (R. 182-183):

> "Q. But by your own testimony, Sgt. Morales, you admit, don't you, that to your knowledge he didn't have anything to eat from early Sunday morning around 6:00 or a little after, until he made this statement, except for a coke and, you say, some milk? A. He was given an opportunity to have anything he wanted.
>
> "Q. Did he have anything to eat? A. He didn't want any.
>
> "Q. The question is, did he? A. No, sir."

The officers testified that he was "offered" food but refused it (R. 177, 379). Petitioner and his sister said none was offered (R. 110, 271-272, 424). Clewis testified that he was questioned almost continuously Sunday night "until about 2:00 A.M. on Monday morning" (R. 106-107, 132-133, 276). The officers testified that he was not questioned past midnight on Sunday (R. 161, 219, 349).

MONDAY, JULY 9

As noted above, petitioner testified he was questioned until "about 2:00 A.M."

Morales testified that he took petitioner from his cell about 7:00 A.M. on Monday and that petitioner was taken to the place where the bones had been found (R. 161, 380). He was led to the "grave" (R. 109, 161-162, 181, 277), and was asked if he knew what it was. He answered: "I told

him I guessed that was where he found the body at" (R. 109). Petitioner had, of course, been told about the grave by others (R. 100, 109, 277-278). Clewis testified that he was questioned about the crime while at the grave (R. 110). About 8:00 A.M., Morales and another officer took Clewis to the Texas Department of Public Safety Building outside the city limits of Midland, Texas (R. 110, 163, 179, 381). He was given four polygraph tests (R. 197, 336), and was interrogated Monday by at least six officers (R. 179, 209, 214, 339-340, 349, 402, 407). The testimony establishes unequivocally that petitioner had nothing but a Coke in the way of food or nourishment during that day until after he had confessed to killing Dorothy Mae Clewis by *shooting* her (R. 115, 178, 362, 369, 383, 400). A newspaper reporter testified that one of the officers told him that petitioner said, late Monday afternoon: "Just bring me some milk and I will give you a statement and sign it" (R. 225). Clewis also testified to that effect (R. 115, 287), and further testified that "I was tired and I was hungry and I was sick" (R. 287) and further (R. 288):

> "I was sick at the stomach. My stomach was bothering me. I hadn't eaten nothing since that Saturday."

Clewis denied that he was given even a Coke on Monday (R. 288) or that he was ever offered anything at all to eat, either Sunday or Monday (R. 133, 139, 288, 311). The evidence further shows that the officers were aware that defendant suffered from a ulcer condition (R. 212).

The record is absolutely silent concerning any warning which was given to petitioner on Sunday or on Monday. Morales testified that petitioner first confessed orally (R. 180, 190), but said nothing about any warning prior to

either the oral or written confession. This first confession was procured late in the evening (R. 115, 201, 211, 290, 370). Clewis testified that the officers told him that he could not leave the Department of Public Safety Building until they got what they wanted (R. 114, 284, 302). During the interrogations, petitioner was placed in a little room with only one chair and an ashtray (R. 390-391). This is the room in which all of the interrogation took place at the Department of Public Safety. Marvin Clewis had repeatedly denied any guilt, or any knowledge concerning the death of his wife (R. 104, 105, 107, 191, 197, 211, 269, 274, 276, 317, 341). He testified that he was struck, cursed, and threatened by the officers while at the Department of Public Safety on Monday (R. 112-115), but the officers denied this. A portion of Clewis' testimony follows:

"Q. Now, Marvin, did anyone threaten you during that time? A. Yes, sir.

"Q. Who? A. Ranger Wood.

"Q. All right, who else? A. Sgt. Morales.

"Q. Anybody else? A. The fellow who was giving the polygraph test.

"Q. All right. Now, what did they tell you they were going to do, if anything? A. Am I allowed to say that here?

"Q. What did Ranger Wood say to you? A. He said if I didn't confess, they were going to take me out to the grave and beat my black ass until I couldn't sit down."

* * * * * *

"Q. Did he make any motions as if to hit you, or anything else? A. He drawed back on me.

"Q. Did he threaten you or say anything else to you?

A. Yes, he said he would turn my black ass wrong side out.

"Q. Did he call you any names? A. Yes, 'black son-of-a-bitch.'"

* * * * *

"Q. Well, did you make a statement to them, Marvin, that you would sign a statement if they would bring you some milk? A. Yes, sir.

"Q. All right, and when was that? A. That was after the polygraph operator hit me."

Although each officer denied any cursing, threatening or physical abuse, they did admit they were trying to get him to confess (R. 179, 187-188, 199, 344, 383, 393, 413), although the phrases used were that they were "trying to get him to tell us the truth," or "trying to get the facts." Both Morales and Wood admitted they were trying to get Clewis to sign a statement (R. 393, 413), although Ranger Wood testified that he "did not remember" what he told him (R. 188, 189, 414). Officer Reid testified that his questioning of Clewis was "more or less repetitious" (R. 201, 341). Officer Reid admitted talking to him as many as five times in addition to the polygraph examinations on Monday (R. 342); Ranger Wood and Sgt. Morales talked to him "several times" (R. 381); officer Robbins talked to him (R. 349); officer Gideon talked to him (R. 209, 402); and officer Robbins admitted interrogating him together with officer Wicker for about an hour on Monday night, ending shortly before 11:00 P.M. (R. 214). Other officers were coming back and forth all day, observing the interrogation (R. 398). According to Clewis, only three of the officers abused him, as detailed above. There was a two-way glass at the

Department of Public Safety Building between an outer office and the little interrogation room (R. 370, 398).

According to the officers, petitioner was taken from the Department of Public Safety to the police station about 7:00 P.M. (R. 370), and was given some soup (R. 360). Officer Herman Wicker testified as follows (R. 360):

> "... I noticed he began to act like he was wanting to vomit, or acted kind of like he was sick, and I asked him was he all right, and he said well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there, and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, 'Do you want a doctor?' and he said, 'No.'"

Following this incident, at about 8:00 P.M., Marvin Clewis was—for the first time—taken before a magistrate (R. 174, 419), and a complaint was filed with the Justice of the Peace charging that he had killed Dorothy Mae Clewis "by shooting her with a gun" (R. 418). The officers knew that the law required that an accused be taken immediately before a magistrate (R. 384-385), but that requirement was ignored in practice. Petitioner was not afforded counsel at this preliminary hearing (R. 289), and the record does not disclose that he was ever apprised of his right to counsel. Petitioner testified that he did not understand the proceedings (R. 116, 289). His bond was set at the sum of $10,000 and the magistrate ordered that he be remanded

to the custody of the sheriff of Midland County, Texas (R. 389). Instead of being delivered to the sheriff of Midland County as directed by the warrant which then issued, petitioner was taken again to the police station (R. 389).

Marvin Clewis was further interrogated on Monday night (R. 118-119, 214, 349), despite the fact that he had been sick. The officers testified that they interrogated him no longer than an hour (R. 214), but petitioner testified that he was interrogated until "around 3:00" Tuesday morning (R. 119). The officers evidently were not satisfied with the statement they had obtained from Clewis that he had shot his wife; and according to petitioner, they accused him of lying in that statement as to the way that his wife was killed (R. 119). He testified that at least three officers interrogated him during that night-time session (R. 118-119).

Petitioner said at the trial that, in the statement given Monday night, he was "just agreeing with Sgt. Morales as to about what happened" and that "Well, I would answer them the way I figured he wanted me to" (R. 286-287). He was allowed to make a telephone call for the first time after he signed the confession, but testified that he was unable to reach the party he called (R. 139-140). He was refused permission to make a telephone call on Sunday (R. 117).

TUESDAY, JULY 10

Petitioner testified he was interrogated at the police station until the early hours of Tuesday morning (R. 119, 312), and all day Tuesday and Tuesday night until after

midnight (R. 120, 312). Testimony for the state showed that he was interrogated on two occasions only during that day, and for short periods (R. 226). Petitioner testified that on Tuesday morning, he was given "a roll and a potato and a slice of bologna" (R. 143), and that this was the first thing he had eaten, except for one quart of milk, since the preceding Saturday night (R. 120). His sister testified that she went to the police station and asked to see him but was refused permission to do so (R. 422), and this is uncontradicted in the Record.

WEDNESDAY, JULY 11

Ranger John Wood testified that he picked up the defendant and officer Morales at the police station at 6:55 A.M. on Wednesday morning (R. 188, 409). This was before breakfast, and Clewis was taken from Midland, Texas, to Borger, Texas, a distance of 300 miles (R. 188, 371, 409-410). The reason given by the officers for this trip was that they needed Clewis to identify his panel truck which they understood was in Borger (R. 386-387, 417). The Texas Ranger, Morales, and a chemist questioned petitioner en route to Borger (R. 121, 365, 386, 414). Petitioner testified that he was threatened and cursed, and that he was interrogated on the way to Borger (R. 121), and on the way back from Borger (R. 300-301):

> "Q. All right, on the way back from Borger, did he talk to you about it? A. Yes, sir.
>
> "Q. What was he trying to get you to do then? A. Well, he was still talking the same thing about signing a confession, that I choked my wife and I didn't shoot her.
>
> "Q. That was what he was saying? A. Yes, sir.

"Q. All right. Now, did Sgt. Morales threaten you on that trip? A. Well, he cursed me a couple of times and, I don't know, he would say something to me and I guess I wouldn't pay him no attention, which I tried not to hear what he was saying, and he drawed back a couple of times.

"Q. He drawed back a couple of times? A. Yes, sir.

"Q. With his hands? A. Yes, sir.

"Q. Never did strike you? A. No, sir."

Upon arrival in Borger, petitioner was required by the officers to point out his truck, and it was searched (R. 122). Petitioner testified that he was not allowed to talk to any persons (R. 309), but the officers testified that he did talk to some person in Borger (R. 372, 410). Clewis also testified that Ranger Wood cursed him and drew back as if to hit him (R. 308), during the search of the truck. Both petitioner and Ranger Wood testified that petitioner was locked up in the city jail in Borger (R. 300, 416). According to the testimony of the state, he was then brought back to Midland, Texas, by automobile and returned to the city jail about 7:15 P.M. (R. 411). He was further interrogated on Wednesday night by officer Herman Wicker (R. 361). Both the officers and petitioner testified that he was given nothing to eat that day except that he was given "a carton of milk" in Borger (R. 122, 300, 416).

THURSDAY, JULY 12

On Thursday morning, petitioner was again taken to the Department of Public Safety Building outside the Midland city limits and was subjected to an extended period of interrogation lasting all day long (R. 389, where Sgt. Morales testified that he was kept out there from 8:30 A.M.

until "about 6:00 o'clock" that evening). The officers testified that Clewis was given nothing to eat on Thursday prior to the time he signed the second confession (R. 391, 415). The two officers did not agree, one testifying he had some milk, and the other testifying that he refused milk. Marvin Clewis continued to deny any guilt in connection with the death of his wife (R. 125, 197, 302). He was given three more polygraph tests (R. 198, 199-200, 342), which petitioner said were taken over his objections (R. 123). He was again questioned by officers Morales, Reid and Wood (R. 124-126, 189, 199, 389, 391-392). After prolonged interrogation and after being physically and verbally abused (R. 125-126, 303-304), the latter being denied by the officers (R. 182, 186, 200), petitioner signed a second confession about 6:00 P.M. (R. 389), in which it was stated that he had killed Dorothy Mae Clewis by choking her with a belt (R. 126, 419). He first confessed orally to Ranger Wood (R. 190). Petitioner testified that Morales pushed him (R. 302), that Wood cursed and threatened him (R. 303), and that Reid cursed him and hit him in the stomach, knocking him out of the chair (R. 303-304). After this last incident, petitioner testified that he gave them the second statement (R. 304):

> "Q. Now, Marvin, how long after that then did you give them another statement? A. I gave them a statement right after that.
>
> "Q. All right, and why did you give them that statement? A. Well, I was tired and I just felt like I couldn't take no more, so I just went on and gave them a statement, and I was hurting so I didn't figure I had no choice."

Major Taylor of the police department testified that, "Word had got back to us that . . . he said he had been mistreated" (R. 396). Petitioner was again interrogated on Thursday night (R. 204), and was not turned over to the sheriff but was kept at the police station, even after the second confession was signed (R. 375), and was kept overnight in the city jail.

FRIDAY, JULY 13

The testimony is conflicting as to when petitioner talked with an attorney. According to Sgt. Morales, Clewis talked with H. S. Harris, Jr., on Thursday morning before being taken to the Department of Public Safety and his subsequent confession there (R. 374, 388). Petitioner testified that he talked with the attorney on Friday morning, after he had made the first two statements, but that the attorney did not represent him and did not give him any advice, but only discussed the fee which would be required (R. 154-156, 314). Clewis' sister asked the lawyer to go see petitioner, but testified that the lawyer did not take petitioner's case (R. 422-423), and that she knew she could not raise the money to retain him. The lawyer did not tell the police he represented Clewis (R. 388). Petitioner was finally delivered—for the first time—to the custody of the sheriff of Midland County, Texas, on Friday afternoon, and was then placed in the county jail (R. 231). Clewis made no complaint of interrogation or any deprivation of food or sleep on this date.

SATURDAY, JULY 14; SUNDAY, JULY 15; MONDAY, JULY 16

Petitioner remained in the county jail of Midland County, Texas, saw no lawyer (R. 237) and was not interrogated.

He did not complain of being mistreated during these days at the county jail.

TUESDAY, JULY 17

About 9:30 in the morning, petitioner was brought to the sheriff's office and two deputies began to interrogate him (R. 231-232). The lawyer to whom petitioner had talked was not notified or summoned to be present; the deputies testified that they were not aware that any lawyer represented him; and petitioner was not told of his right to counsel (R. 99, 236-237). He again denied guilt (R. 232), and reluctantly related to the sheriff's deputies the threats and abuse which he claimed had been inflicted by officers Morales, Reid and Wood (R. 96, 233-234). During the course of this interrogation, he asked to "talk to someone" (R. 98, 235). He specifically asked to talk to his "boss man" who lived in Odessa, Texas, but the deputy sheriff said he could not reach him by telephone (R. 235). The deputy sheriff then called the district attorney of Midland County who came down and talked to petitioner (R. 95, 152, 153, 233), and after that conversation, the petitioner orally confessed. His confession was later reduced to writing (R. 95, 153). There is testimony that petitioner was given the formal statutory warnings by the deputy sheriff prior to this third written statement (R. 93), but there is no evidence that he was warned prior to his oral admission. He was told that he might be given further polygraph tests (R. 127, 236). About 10:45 the written statement was begun and was thereafter signed by petitioner (R. 232). This is the statement which was introduced in evidence at the trial as State's Exhibit 13 (R. 428-429), over objection by petitioner (R. 228, 230).

At the trial, petitioner stated that all three confessions were false and, regarding the third confession, he testified (R. 514):

> "Mr. Mims came down there and I could see it all over again, the same thing. I went three or four days already on the same kind of thing and they, the other officers, said that they wouldn't do this and wouldn't do that but they did, and I didn't have no reason to believe they wouldn't be any different than them. I didn't think I could go through that kind of punishment again, so I had signed one statement, two statements, at least, and I didn't figure it made much difference . . . I was scared. I was scared they would do the same thing."

Petitioner further testified (R. 317):

> "If you was locked up some place like that and everybody against you, wouldn't you be scared, too?"

At the beginning of the trial, petitioner filed a Motion to Require State to Produce Confessions (R. 3-5), and contemporaneously filed a Motion to Exclude and Suppress State's Confessions (R. 6-11). In both of these motions, petitioner contended that the confessions were involuntary and were taken in violation of his rights under the Constitution of the United States. These motions were filed before any evidence was submitted and were overruled at that time (R. 88). The Motion to Exclude and Suppress State's Confessions was again presented before the confession was introduced (R. 87-92), and voluminous testimony was introduced on the motion by both petitioner and the prosecution (R. 92-228). The motion was then over-

ruled by the trial court (R. 228). The trial court did not file any findings of fact until eight months after the trial was begun, and on the day prior to the submission of the case on oral argument in the Court of Criminal Appeals of Texas (R. 440, 454-455), but the Court of Criminal Appeals accepted such Findings of Fact, though the finding and filing of such facts was considerably belated (R. 461, 472).

Following conviction, petitioner perfected his appeal to the Court of Criminal Appeals of Texas, and in three written opinions (R. 441, 461, 472), that Court affirmed the conviction and held that the action of the trial court in overruling our Motion to Exclude and Suppress State's Confessions was proper. That Court cited only one case from the Supreme Court of the United States (*Lyons* v. *Oklahoma,* 322 U.S. 596, 88 L.Ed. 1481, cited at R. 444, other than *Escobedo* v. *Illinois, infra,* which was held not to apply in this case). In its original opinion, the Court of Criminal Appeals did not discuss petitioner's contention that *Wong-Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, required reversal in this case and exclusion of the confessions. This contention had been advanced at length in our original briefs and again in Appellant's Motion for Rehearing (R. 451-454), and in Appellant's Second Motion for Rehearing (R. 464-469). In the opinions of November 10, 1965 (R. 461), and January 5, 1966 (R. 472), the Court of Criminal Appeals attempted to distinguish the facts in this case from the facts in *Wong-Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 and *Collins* v. *Beto,* 348 F.2d 823 (5th Cir., 1965).

On January 18, 1966, the Court of Criminal Appeals of Texas entered its order granting to petitioner a stay of

mandate pending application to the Supreme Court of the United States for a writ of certiorari (R. 479). Thereafter, Marvin Clewis filed his Petition for Writ of Certiorari in this Court, together with his Motion to Proceed in Forma Pauperis, and the petitioner's motions were granted on October 10, 1966 (R. 481).

Summary of the Argument

1. This case is presented as a "totality of the circumstances" case. *Fikes* v. *Alabama,* 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957); *Reck* v. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Haynes* v. *Washington,* 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Culombe* v. *Connecticut,* 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, —— L.Ed.2d —— (1966). Three written confessions were obtained by the officers from Marvin Clewis, and each of these confessions was inadmissible under the rules laid down by this Court. We have detailed the facts chronologically in the *Statement* portion of this Brief. At the risk of repetition, but because the facts are determinative of the result in this case, we have again detailed them categorically in our Argument to demonstrate that petitioner's will was overborne each time he confessed. The totality of the circumstances rendered the use of the third confession at the trial a denial of due process. The same coercive circumstances which produced the first two confessions were still operating when Clewis signed the third confession.

Clewis was subjected to prolonged interrogation and incommunicado detention, causing his will to be overborne

after he was arrested illegally and without a warrant by a police officer who did not take him before a magistrate until 38 hours later, after the first confession. During his detention, petitioner was not given proper or adequate food or rest, and his basic rudimentary need for these things was disregarded by the police officers. At the time the statements were made, petitioner was in a weakened condition and was sick, so that his confessions cannot be deemed to be the product of a rational intellect and a free will.

During his prolonged interrogation by police officers, Marvin Clewis was never advised of his absolute right to remain silent and to refuse to answer, and the Record in this case does not reveal that he was ever given any warning prior to confessing orally or prior to signing the first two confessions. At no time was Clewis advised of his right to counsel, and he was not represented by counsel during the interrogation or until long after the confessions were signed. The assistance of counsel was of vital importance at his preliminary hearing. Clewis testified he was physically assaulted, threatened, cursed, and abused by the officers prior to making the first and second confessions. He was moved from jail to jail and was incarcerated in three jails, one of which was more than 300 miles away.

2. The arresting officer admitted that he arrested Clewis without probable cause, and that he had no grounds sufficient to secure a warrant for that arrest. Petitioner had come voluntarily to the sheriff's office and had been questioned by a deputy sheriff on the night before his unlawful arrest. The deputy sheriff had told him to go home and come back the following morning, but the city police officer,

who had not participated in the investigation of the case, woke him up at 6:00 A.M. the following morning and took him to the police station where he began the lengthy interrogation. Under the exclusionary rule of *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962) and *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), no confession made by Clewis after this arrest was admissible against him. The "fruit of the poisonous tree" doctrine forbids the use of such confessions, and the mere passage of time cannot dissipate the taint of unlawful arrest.

3. Petitioner should have been permitted to examine all three written statements in possession of the state, under the policy requiring full disclosure in criminal cases, and refusal of his motion constituted a denial of due process.

ARGUMENT

1.

The Statements Made by Petitioner and the Written Statement Introduced in Evidence in This Case Were Involuntary and Were Made at a Time When Petitioner's Will Was Overborne, and the Totality of the Circumstances Preceding the Confession Establishes That Its Use in Evidence Was a Denial of Due Process Under the Fourteenth Amendment to the Constitution of the United States.

Under the rules laid down by this Court in its decision in *Miranda* v. *Arizona*, 384 U.S. ——, 86 S.Ct. 1602, 16 L.Ed.2d —— (1966), the testimony of the police officers alone in this case would, we respectfully submit, require reversal. This trial was begun on May 11, 1964, some

six weeks prior to the decision of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Because *Miranda* and *Escobedo* were applied prospectively, *Johnson* v. *New Jersey,* 384 U.S. ——, 86 S.Ct. 1772, 16 L.Ed.2d —— (1966); petitioner relies in this case on a long line of decisions preceding the *Miranda* decision and upon *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, —— L.Ed.2d —— (1966), wherein Mr. Chief Justice Warren wrote:

> "As we pointed out in *Johnson,* however, the non-retroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) . . . The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan,* 378 U.S. 1, 6-8, 84 S.Ct. 1489, 1492-1493, 12 L.Ed.2d 653 (1964).
>
> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the voluntariness of statements later made."

The Court further said (86 S.Ct. 1761, 1764):

> "It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."

This, then, is a "totality of the circumstances" case. As this Court said in *Fikes* v. *Alabama,* 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957):

> "Standing alone, the state's evidence establishes that the confessions in the present case were not voluntary within the meanings of the decisions of this Court. . . . He was questioned for several hours at a time over the course of five days preceding the first confession, and again interrogated at length before the written confession was secured. There is no evidence of physical brutality, and particular elements that were present in other cases in which this Court ruled that a confession was coerced do not appear here. . . . *The totality of the circumstances that preceded the confessions in this case goes beyond allowable limits. The use of confessions secured in this setting was denial of due process.*" (Emphasis our own.)

As we have pointed out above (Br. 11, 12), three written confessions were obtained by the officers from Marvin Clewis. The state introduced only the third confession, which was taken by sheriff's deputies and which was not preceded by any independent coercive influence for a period of four days prior to its taking (R. 150-152), except for the fear of another polygraph examination (R. 127, 153). Petitioner contended at the trial (R. 7, 30-33, 87-88, 127-

128, 432) and in the Court of Criminal Appeals of Texas that the third confession was not admissible because the coercive influences attending the first two confessions carried over and the third confession was produced by the same influences. *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957); *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). All three confessions were, under the facts here present, subject to the same infirmities.

This Court has repeatedly stated that it will make an independent examination of the facts in cases where the voluntariness of a confession is questioned. The facts being of greatest importance in this case, we feel compelled to restate them categorically as we present our argument. What, then, are the facts which establish coercion in this case? They are considerable, and many of the most significant facts of coercion are established by the testimony of the officers themselves. We shall attempt to discuss the facts under the headings in "Questions Presented" above (Br. 2, 3), in order to fully demonstrate the involuntary nature of each of these confessions.

A. *Marvin Clewis was subjected to prolonged interrogation and incommunicado detention after being arrested illegally and without a warrant at 6:00 A.M. on Sunday morning on July 8 by a police officer who had not participated in the investigation and admitted that he had no grounds upon which a warrant could issue for petitioner's arrest.*

Petitioner was taken to the Midland police station and questioned by officer Morales. That officer said he was "in-

vestigating a Missing Persons Report" (R. 377), although Dorothy Mae Clewis had been "missing" for almost six months. Morales continued to question him all day Sunday, admitting that the questioning covered a period of six hours on that day (R. 379). Petitioner testified that he was questioned much longer than that period during the day Sunday (R. 104-106, 268-270), and that other officers questioned him beginning on Sunday morning (R. 104). Officer Robbins did admit that he was in the room with petitioner and Morales during the time that visitors were there Sunday (R. 352). Petitioner's testimony was that Morales and the other officers were trying to get him to confess that he had killed his wife (R. 107, 269, 270), and that they "wanted me to sign some papers" to take a lie detector test (R. 270). Morales admitted that he was trying to get petitioner to sign a polygraph waiver (R. 379), although he testified that he didn't say anything to Clewis about murder or the grave or "anything" on Sunday (R. 392-393). This is hardly believable, in the light of the Record. Morales further admitted talking to petitioner's mother-in-law on Sunday, and "possibly" telling his mother-in-law to encourage Clewis to agree to a polygraph examination, and that it would help him (R. 169-170). Petitioner insisted that the questioning continued all of Sunday night and until about 2:00 A.M. Monday (R. 106-107, 132-133, 312). The officers testified that he was not questioned at any time after midnight (R. 161, 219, 349).

On Monday morning, before 7:00 A.M., petitioner was taken by three police officers to the "grave" where the bones had been excavated. He was questioned there (R. 109-110). Morales described this event in this way on cross-examination (R. 380):

"Q. What time did you see him Monday morning? A. Oh, around 7:00.

"Q. And what was that for? A. Oh, we took him for a ride, out in the country."

This was a most harrowing experience for Marvin Clewis, and was an attempt by the police to play upon his ignorance and his superstitions, and to frighten him. It was just another of the many pressures which the police applied with regularity in their determination to break the prisoner down. Clewis was then taken to the Department of Public Safety outside the Midland city limits, where he was given four polygraph tests and admittedly interrogated by at least six officers (R. 179, 197, 209, 214, 336, 339-340, 349, 402, 407). About 6:00 P.M. Monday, he signed the first confession, in which he stated that he had killed his wife by "shooting her with a gun" (R. 117, 286, 418-419).

During all the interrogations on Monday, petitioner was placed in a little room with only one chair and an ashtray and nothing else (R. 390-391). The officers then took him before a magistrate, and a complaint was filed with the Justice of the Peace (R. 174, 418-419). This is the first time any charge had been filed against petitioner, and the only time he was taken before a magistrate. Petitioner was then returned to the police station and was further interrogated on Monday night (R. 118-119, 214, 349), despite the fact that the police officers admitted that he was sick following the first confession (R. 360). Although Robbins stated this session ended at 11:00 P.M., petitioner testified that he was interrogated until the early hours of Tuesday morning (R. 119, 312) by relays of officers. Officer Kuykendall admitted interrogating petitioner on two occasions

Tuesday, for short periods (R. 226), but petitioner testified that he was interrogated all day Tuesday and until after midnight on that date (R. 120, 312).

On Wednesday, Ranger Wood, officer Morales and Mr. Merritt took Clewis out of his cell at the police station at 6:55 A.M. and took him by automobile to Borger, Texas, a distance of 300 miles (R. 188, 371, 409-410). He was questioned en route to Borger (R. 121, 365, 386, 414), and petitioner testified that he was threatened and cursed (R. 301). The officers locked Clewis up in the city jail in Borger (R. 300) while they went to lunch. He was then brought back to Midland, Texas, and again returned to the city jail about 7:15 P.M. (R. 411). Officer Herman Wicker admitted that he interrogated Clewis on Wednesday night (R. 361).

Transporting a prisoner a long distance and locking him up in jail in another city is the same kind of conduct which was condemned by this Court in *Ward* v. *Texas,* 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942), and *Reck* v. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961). This was simply one more pressure which the police were applying at their pleasure.

Thursday morning, petitioner was again taken to the Department of Public Safety Building from the police station and was interrogated all day long (R. 389). The officers were not satisfied with the first confession which they had taken, and were unable to find any evidence of any gunshot wounds. Because of that, they were determined to force a confession out of Marvin Clewis which would satisfy the meager evidence which they had on hand. Marvin Clewis continued to deny any guilt in connection with the death of his wife (R. 125, 197, 302). He was

given three more polygraph tests (R. 198, 199-200, 342), and they finally extracted a confession from him about 6:00 P.M. (R. 389), in which it was stated that he had killed Dorothy Mae Clewis by choking her with a belt (R. 126, 419).

On Monday and again on Thursday, petitioner said he was repeatedly told that he "wasn't leaving there until they got what they wanted" (R. 114, 284, 302), and that they were going to make him confess "one way or the other" (R. 114). This kind of questioning certainly suggested "that the questioner has a right to, and expects an answer." *Culombe* v. *Connecticut,* 367 U.S. 568, 574, 81 S.Ct. 1860, 1864, 6 L.Ed.2d 1037 (1961). Clewis had every reason to believe that there might never be an end to the questioning unless he did what the officers wanted him to do. *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, 1770, —— L.Ed.2d —— (1966); *Haynes* v. *Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). In *Culombe,* Mr. Justice Frankfurter wrote:

> "In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingement . . . of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects an answer. This is so, certainly, when the prisoner has never been told that he need not answer and, when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

The state attempts to make a great deal of the fact that petitioner's sister and mother-in-law visited him on Sunday afternoon. The record shows beyond question, however, that petitioner was not allowed to visit alone with these persons, but that the officers were present during the entire interview (R. 174, 218, 352, 379, 421). These people visited with Clewis at the instigation of officer Morales and they encouraged him to agree to take a polygraph test. Officer Morales testified:

> "Q. Did you talk to her before she went up there? A. I might have.
>
> "Q. You told her she ought to get Marvin to take a polygraph test, didn't you? A. Possibly.
>
> "Q. You told her it would help him if he did, didn't you? A. I don't recall saying that.
>
> "Q. You think you might have said that? A. It is possible."

Clewis was denied his request to make a telephone call on Sunday (R. 117). After he signed the first confession on Monday, he was allowed to make a telephone call but testified he was unable to reach the party he called (R. 139-140). His sister was refused permission to see him during all the time he was at the city jail, after Sunday (R. 422). One officer testified that he had a visitor on Monday night (R. 370), but petitioner denied this (R. 312). The only persons that petitioner said visited him were his ex-wife and Mabel Webster (R. 296-297), but he did not remember what day they were allowed to come see him (R. 314-315). Clewis testified that he did talk with a lawyer on Friday morning, after he had made the first two confessions (R. 314). Morales testified that he talked to a lawyer about 7:30 on Thursday morning (R. 388), before Clewis made

the second confession and before he was taken to the Department of Public Safety for further lie detector tests and interrogation.

We submit that these circumstances amount to an incommunicado detention, and that petitioner was not accorded his constitutional rights.

On Tuesday morning, after the interrogation in the sheriff's office began, petitioner again said that he would like to "talk to someone" (R. 235). The deputy sheriff testified that Clewis said he "most of all would like to talk to his boss man . . . and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time." The deputy then called Mr. Mims, the district attorney of Midland County, who came down and talked to petitioner. After that conversation, petitioner orally confessed and his confession was later reduced to writing (R. 95, 153).

This course of interrogation and detention comes within the test set down by this Court in *Culombe* v. *Connecticut*, 367 U.S. 568, 630, 81 S.Ct. 1860, 1894, 6 L.Ed.2d 1037 (1961):

> "Culombe was taken by the police and held in the carefully controlled confinement of police custody for more than four days before he confessed. During that time, he was questioned—questioned every day about the Kurp's affair—and with the avowed intention, not merely to check his story to ascertain whether there was cause to charge him, but to obtain a confession if a confession was obtainable. All means found fit were employed to this end . . . It is clear that this man's will was broken Wednesday night . . . Neither the

Wednesday afternoon nor the Wednesday midnight statement may be proved against Culombe, and he convicted by their use, consistent with the Constitution . . . *When interrogation of a prisoner is so long continued, with such purpose, and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt, due process precludes the use of the confession thus obtained.*" (Emphasis our own.)

The officers admitted at the trial that they had talked to Clewis about making a statement or confession. Ranger John Wood testified (R. 413):

"Q. Well, I understand that: I said, 'What were you trying to get this defendant to do?' A. We were trying to get him to tell us the truth.

"Q. All right, you were trying to get him to make a statement, weren't you? A. We were trying to get him to tell us the truth, yes, sir.

"Q. You never did say anything to him about making a statement? A. Yes, sir, I sure did."

Officer Morales testified (R. 393-394):

"Q. Well, do you remember when you first told him that he ought to make a statement on Monday? A. Oh, it must have been in the afternoon.

"Q. Now, when did you tell him on Thursday that he ought to make a different statement? A. I didn't tell him he ought to. I just told him if he wanted to get the whole truth down, tell us about it."

Officer Reid testified (R. 341):

"Q. What did you say? A. I talked to him, I questioned him, and during the examination I talked to

him and told him to tell the truth about what had occurred.

"Q. To tell the truth about what had occurred. Now, you didn't tell him that for 30 minutes. A. Well, it was more or less a repetitious type of talk that I was going through."

* * * * *

(R. 344):

"Q. Did you tell him you thought he had killed his wife?"

* * * * *

"A. Yes, sir."

* * * * *

"A. All I told him was to tell the truth of what occurred.

"Q. Well, you had to talk to him all those periods of time to tell him to tell the truth? Did you tell him that each time you talked to him? A. Yes, sir, several times."

Ranger Wood testified further (R. 187-188):

"Q. Of course, you all were trying to get a confession from him, weren't you? A. We were trying to get the truth out of him, yes, sir.

"Q. Well, you were trying to get him to sign a statement? A. If he was the guilty party, we wanted one, yes, sir.

"Q. All right, and that was what you were talking to him about, wasn't it? A. That afternoon, yes, sir.

"Q. And did you tell him he ought to sign a statement? A. I don't remember what I told him."

Common sense dictates the conclusion that this uneducated Negro man, who had finished the fifth grade in

school, and who had never before been in trouble with the law (R. 237, 283), would eventually break down under this relentless interrogation. *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957), *Turner* v. *Commonwealth of Pennsylvania*, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810 (1949), *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 180 (1949), *Ward* v. *Texas*, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942), *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), *Blackburn* v. *Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). The polygraph examinations in themselves were considerable pressures, exhausting and perplexing and frightening to Marvin Clewis. To this man, this pressure was just as effective as the "truth serum" which was condemned by this Court in *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 77 (1963). This Court said:

> "Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible."

This petitioner certainly had a right to feel that everyone was against him. He testified in answer to the prosecutor's question (R. 317):

> "If you was locked up some place like that and everybody against you, wouldn't you be scared, too?"

Can it be any wonder that petitioner could "see it happening all over again" (R. 153), and that he didn't think he could "go through that kind of punishment again" (R. 307), when confronted by the sheriff's deputies for the third confession? As this Court observed in *Watts* v. *Indiana*, 338 U.S. 49, 53-54, 69 S.Ct. 1347, 1350, 93 L.Ed. 180 (1949):

> "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary . . . This was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."

Petitioner testified that he was given no opportunity for "rest periods" Sunday night (R. 132-133), Monday (R. 137), or Tuesday night (R. 145); and there could hardly have been any time on Thursday. The officers testified that he was given rest periods between the interrogations on Monday and Thursday (R. 165, 194, 196, 202, 411), but there is no statement anywhere as to the length of such rest periods. While the interrogation was not continuous in the fashion described in *Ashcraft* v. *Tennessee,* 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 945 (1944), where the evidence showed that Ashcraft was given only one five-minute rest period, this Court gave conclusive effect to Ashcraft's good reputation, to the failure to unearth any clue pointing to his guilt, and to Ashcraft's steadfast denial that he had anything to do with the murder of his wife. All of those things were here present in this case, in addition

to the fact that Marvin Clewis voluntarily drove 300 miles when he heard the sheriff wanted to talk to him. He denied knowing about his wife's death all day Sunday, Sunday night, and Monday until late in the afternoon. It was then that his will was broken, and he became incapable of resisting the pressures of the police. He continued to deny any guilt on Thursday, until the second confession was finally made about 6:00 P.M. He again denied any guilt on Tuesday morning in the sheriff's office. All of these facts are uncontradicted in the Record.

Aside from his confessions, as in *Ashcraft*, there is nothing in this Record which in any way connects Marvin Clewis with the death of his wife. The only evidence which could remotely be considered to constitute anything pointing to his guilt is the testimony of Shirley Jean Judie, the daughter of the deceased, and the testimony of Rachel Garnett, the deceased's mother. Mrs. Judie testified (R. 74-76) that petitioner had threatened Dorothy Mae Clewis, but she did not at any time repeat these threats to the police, although there was ample opportunity to do so (R. 81-82). Rachel Garnett testified (R. 326-331) to several incidents which had happened a year or more before when there had been trouble between Marvin and Dorothy Mae Clewis, but she also never told the police these things (R. 333). Other witnesses testified that Marvin Clewis was good to Dorothy Mae and that they never did have any trouble (R. 71-72, 254, 351).

The forces compelling the first two confessions were still very much present on Tuesday morning when the sheriff's deputies secured the third confession after bringing the district attorney down to talk to petitioner. This is evident by petitioner's testimony (R. 307):

"... I had already been through that once, and those other officers told me the same thing, that nothing was going to happen to me, they wasn't going to do this and they wasn't going to do that, but they did, so they went and got Mr. Mims ... so I was scared because I figured the same thing that those other officers done to me, that they would do the same thing; so I had already signed two statements and I didn't figure it made much difference, because those other officers said they wouldn't beat me or nothing, but they did, so I figured they would do the same thing."

Petitioner had every reason to believe that, unless he complied with the officers' wishes, he would be held and interrogated until he gave them the statements they wanted.

B. *Marvin Clewis was not given proper or adequate food or rest and his basic rudimentary need for these things was disregarded by the police officers preceding the time that defendant signed the first and second written statements. Petitioner was in a weakened condition and was sick, and in such condition that his confessions cannot be deemed to be the product of a rational intellect and free will within the meaning of the decisions of this Court and the Fourteenth Amendment to the Constitution of the United States.*

The testimony of the police officers themselves concerning the lack of food and rest and their total disregard of petitioner's obvious physical condition, is of itself shocking to the sensibilities of men who would like to believe that the Inquisition is forever locked away as a dark chapter in mankind's history. To briefly summarize the evidence on the question of food, rest and physical condition, it must

first be recalled that petitioner left Borger, Texas, about 6:15 P.M. on Saturday and drove 300 miles to Midland. He left Borger as soon as he changed clothes after work (R. 265). He came to Midland and went directly to the sheriff's office, arriving there about 11:30 P.M., where he was questioned until about 2:00 A.M. by deputy Kirksey (R. 265-266). He then went to the home of Elizabeth Johnson and went to bed. He was awakened by Morales at 6:00 A.M. on Sunday morning, and immediately taken to the city police station.

Officer Morales said that he gave Clewis a roll at the police station (R. 377), but petitioner denied this (R. 271), and said he was given nothing to eat at any time that day (R. 272). Officer Morales testified that petitioner did not eat any other time on Sunday (R. 177, 379), and that he was taken from the jail at 7:00 A.M. on Monday without having eaten (R. 111, 177-178, 279). At the Department of Public Safety, the officers testified he was given a Coke at noon (R. 164, 399), but petitioner denied that he was given even that (R. 288). Late in the afternoon, after having been physically abused, he was quoted in the newspaper as having said, "Just bring me some milk and I will give you a statement and sign it." The newspaper reporter testified (R. 225):

> "Q. Now, you wrote in that story that afternoon the details of the statement and the chronological order of the things that happened on Monday previously, and I believe you had a quote in there, 'Just bring me some milk and I will give you a statement and sign it.' Now, did Mr. Clewis tell you that, or one of the officers tell you that? A. I feel certain one of the officers told me that.
>
> "Q. Do you know which one? A. No, sir, I don't."

Petitioner testified he was in pain before the statement was signed on Monday (R. 288):

> "I was sick at the stomach. My stomach was bothering me. I hadn't eaten nothing since that Saturday."

and further (R. 117):

> "I was scared and I was sick and I was hungry, and I just felt I couldn't take no more."

When petitioner signed the statement, he was given some milk (R. 115, 287, 362, 400). Officer Morales admitted that Clewis had nothing to eat from early Sunday morning, around 6:00 A.M., until the milk was given to him when he made the first statement about 6:00 P.M. on Monday (R. 182-183, 383, 385). Petitioner was taken back to the police station about 7:00 P.M. (R. 370). Two officers testified that they stopped and bought petitioner some soup on Monday night, and that he ate it (R. 384, 403). Petitioner denied that he was given anything to eat except the milk late that afternoon (R. 287-288). The officers were aware that petitioner suffered from an ulcer condition (R. 403).

In its reply brief to our Petition for Certiorari, the state at page 10 of its brief makes the statement that petitioner was asked if he wanted a doctor after he was removed to the county jail. This is in error. The inquiry about the doctor came a week before that: on the Monday night just after petitioner had made the first statement, and was at the city jail. Officer Herman Wicker testified (R. 360):

> ". . . I noticed he began to act like he was wanting to vomit, or acted kind of like he was sick, and I asked

him was he all right, and he said, well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything, and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there, and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, 'Do you want a doctor?' and he said 'No.' "

Despite this sickness, petitioner was interrogated Monday night. The officers admitted to interrogating him from 10:00 until 11:00 P.M. (R. 349). It is significant that the officer who testified to the sickness as related above was one of the officers present during this interrogation (R. 349). Petitioner testified he was questioned until long after midnight (R. 119).

Petitioner testified that he was given "a roll and a potato and a slice of bologna" on Tuesday (R. 143), which was the first food he had been given since he was taken to the police station (R. 120).

On Wednesday, petitioner was taken from his cell and put into a car at the police station at 6:55 A.M. (R. 188, 409) with Morales, Wood and a chemist, and taken to Borger, Texas. Officer Morales testified that Clewis ate no breakfast that morning (R. 371), and that the only thing he had to eat was a carton of milk which was given him in Borger (R. 372, 410). One of the officers testified that Clewis was fed milk and crackers on Wednesday night (R. 355). Officer Morales testified that petitioner was given milk Thursday morning (R. 374), while he was

talking to a lawyer, but testified that he did not eat anything else until Thursday night, although he had offered him milk at noon and he had refused it (R. 391).

Petitioner could not have slept more than three to four hours on Saturday night, the time which elapsed between his departure from the sheriff's office and officer Morales' arrival at 6:00 A.M. Petitioner testified that he was questioned until "around 2:00 A.M." on Monday morning, and the officers left the jail with him at 7:00 A.M. on Monday morning to take him to the grave. The officers admitted questioning him until 11:00 P.M. Monday night, and petitioner testified it was long after midnight. On Tuesday morning, he was interviewed by a newspaper reporter who testified that Marvin Clewis was "a very unhappy appearing individual," and he wrote in his story that "Marvin Peterson Clewis, 35 year old Negro pipeline worker, peered through bloodshot eyes early Tuesday after spending a sleepless night in his bunk inside the city jail" (R. 224-225). One of the officers testified that he questioned him on Wednesday night (R. 361).

Marvin Clewis was fed considerably less than the petitioner in *Reck* v. *Pate*, 367 U.S. 433, 441-442, 81 S.Ct. 1541, 1547, 6 L.Ed.2d 948 (1961), where Mr. Justice Stewart said:

> "During the entire period preceding his confessions, Reck was without adequate food, without counsel, and without the assistance of family or friends. . . . He was physically weakened and in intense pain. We conclude that this total combination of circumstances 'is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force

is brought to bear.' *Ashcraft* v. *State of Tennessee,* 322 U.S. 143, 154, 64 S.Ct. 921, 926, 88 L.Ed. 1192."

This Court also condemned the failure to give adequate food and rest to petitioner in *Payne* v. *Arkansas,* 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958).

There was no place for Marvin Clewis to rest or sleep at the Department of Public Safety (R. 390-391). Petitioner testified that he was unable to sleep Sunday night, even after the questioning ended, because "My stomach was hurting and I was hungry and I was also tired" (R. 279). On both Monday and Thursday, he was subjected to polygraph tests, which was a wearing experience in itself, aside from the continual questioning to which he was subjected. This evidence readily demonstrates that Marvin Clewis was absolutely exhausted late Monday when he finally signed the first written "confession." He was simply not capable of making a statement which can be considered reliable. The officers testified that he was "sick" and "acted like he was wanting to vomit" after he came back to the police station following the first statement (R. 360). This man was in no condition to make any kind of statement at all on Monday.

This Court has said, in *Watts* v. *Indiana,* 338 U.S. 49, 53, 69 S.Ct. 1347, 1349, 93 L.Ed. 180 (1949):

> "Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant . . . as part of the total situation out of which his confessions came and which stamped their character."

In his concurring opinion, Mr. Justice Douglas aptly observed:

> "It would be naive to think this custody was less than the Inquisition. The man was held until he broke. Then and only then was he arraigned and given the protection which the law provides all accused."

The State contends, and the officers contended at the trial, that petitioner was "offered" food, and that he had "opportunity" to sleep and rest. If, as this Court has so often stated, the ultimate question is whether the confession was the "product of a rational intellect and a free will" and "whether the defendant's will was overborne", then the fact that petitioner here was "offered" food or had the "opportunity" for sleep and rest, cannot be of constitutional significance. The question must inquire as to whether or not the defendant was *capable* of making a confession, and the above cases seem to hold that a defendant who has not had adequate food or rest cannot be capable of making a confession. The petitioner has denied that he was offered any food at the pertinent times, and that he had any significant amount of rest, and, of course, it is his word against that of officers of the law. There is, however, no question but that he did not have any food from Sunday morning until Monday night except for a Coke at noon and some milk late in the afternoon Monday when he signed the first statement. There is also no question about his being sick just a short time after making the first statement. The question must, in the final analysis, boil down to this: What was his *actual* physical and mental condition at the time he confessed?

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein* v. *New York*, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093, 97 L.Ed. 1522 (1953).

This uneducated Negro, faced with the awesome powers of those whose prisoner he was, suffering from lack of sleep, lack of food, being constantly interrogated, sick—all of these are overpowering forces to such a person, cut off as he was from family and friends in the coercive environment of three separate police strongholds.

As this Court pointed out in *Davis* v. *North Carolina*, —— U.S. ——, 86 S.Ct. 1761, 1767, —— L.Ed.2d —— (1966):

> "We may readily agree that the record does not show any deliberate attempt to starve Davis, compare *Payne* v. *State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958), and that his diet was not below a minimum necessary to sustain him. Nonetheless, the diet was extremely limited and may well have had a significant effect on Davis' physical strength and, therefore, his ability to resist."

In that case, Davis was fed two sandwiches twice a day, occasionally supplemented with peanuts and other "stuff." That was far more sustenance than Marvin Clewis was given at any time while he was confined in the Midland police station or the Department of Public Safety or the jail in Borger, from Sunday morning until Friday morning. His ability to resist was undoubtedly affected significantly by his lack of food and rest.

Petitioner was fed after he was transferred to the Midland county jail on Friday (R. 305), and he made no complaint about food and rest after that. However, it would be naive to think that his previous experience when he was denied food and rest was not the determining factor in his decision to go ahead and get it over with

when the deputies and the district attorney, Mr. Mims, talked to him about giving the third confession. As he testified (R. 307): "I didn't think I could go through that kind of punishment again."

C. *During the lengthy and prolonged interrogation by police officers, petitioner was never advised of his absolute right to remain silent and to refuse to answer, at a time when his commitment to custody seemed to be at the will of his questioners and he had every reason to believe that he would be held and interrogated until he spoke. No warning was given him prior to any oral confessions, or prior to his signing of the first two confessions, and the third written statement was preceded by a warning given him in general terms by the interrogating law enforcement officers.*

Nowhere in this voluminous record is there any testimony that this defendant was apprised of his right to remain silent or was given a warning of any kind at any time Sunday, or on Monday, prior to the making of the first written statement, or at any other times preceding the Thursday confession. Rather, the contrary most convincingly appears. The facts are clear and undisputed with reference to the interrogation and confession: The officers were determined to get a confession from Marvin Clewis (R. 179, 187-188, 199, 200, 344, 382-383, 393-394, 413). See excerpts from testimony of Ranger Wood, officer Morales and officer Reid, at pages 40, 41 and 42, this Brief. Petitioner repeatedly denied any guilt on Sunday and Monday (R. 104, 105, 107, 191, 211, 269, 274, 276, 317, 341). Petitioner continued to deny his guilt on Thursday at the Department of Public Safety prior to the taking of the second confession (R. 125, 197, 302). He also denied any

guilt on Tuesday, July 17, during the interrogation at the sheriff's office (R. 232).

This overzealous conduct of the officers and their treatment of petitioner hardly indicates an atmosphere in which the officers would have troubled to advise petitioner of his right to remain silent, or of his right to counsel. To the contrary, he was induced by officers and kin to submit to polygraph tests (R. 169-170), was accused of killing his wife over and over, and was subjected to the many pressures detailed above. Consideration must be given to that conduct and to the manner in which petitioner was dealt with. He was awakened at 6:00 A.M. on Sunday by officer Morales and taken to the police station; he was not allowed to visit alone with his sister, his mother-in-law and Elizabeth Johnson when they came to see him on Sunday; officer Morales had talked to those three persons and "possibly" told them that they should tell Clewis to take a polygraph test, and that it would help him; he was taken to the grave where the bones had been excavated at 7:00 A.M. on Monday; he repeatedly denied any guilt, as set forth above; he testified that he was told that he wasn't leaving the Department of Public Safety Building until he signed a confession (R. 114, 284, 302); he was admittedly questioned at night, and subjected to relentless interrogation from Sunday until late Thursday; he was not taken before a magistrate until 8:00 P.M. Monday night, after he had signed the first confession (R. 173-174); he was refused permission to make a telephone call Sunday (R. 117); he was not delivered to the sheriff of Midland County, Texas, as the warrant commanded until Friday afternoon, July 13 (R. 231, 389); and he was permitted to talk to no one except the officers and the district attorney during the interrogation on the following Tuesday morning.

As pointed out in the brief for the state (Br. 8), there is no testimony concerning any warnings given petitioner at any time during the Sunday through Friday interrogations. There is no testimony that he was warned, and no testimony that he was not, but the facts detailed above certainly indicate a situation in which he was not advised of his right to remain silent or of his right to counsel. This warning is just as necessary before an oral confession as it is before a written statement. *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). According to this Record, the only time petitioner was ever warned that he did not have to make any statement at all was just prior to the third written confession which was introduced in evidence (R. 230). This warning was made in general terms by the deputy sheriff, and there is no evidence that he was warned at the beginning of the interrogation or advised of his rights. Petitioner submits that it is quite obvious from all the testimony that no warnings were in fact ever given to petitioner during any other interrogation. The warning was, of course, of no effect in the third, because the forces compelling the first two were still very much present. *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957). Petitioner testified (R. 153):

> "They went and got Mr. Mims, and when they went and got him, why, I was scared, because I could see it looked like the same thing happening all over again, that three or four days of abusing, and I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement because I had already made two statements and I didn't figure it made any difference. I had signed two."

The conduct of the officers in this case amounted to "horse-shedding of the accused at the intermittent pleasure of the police until confession was forthcoming" which was condemned by Mr. Justice Frankfurter in his concurring opinion in *Fikes* v. *Alabama*, 352 U.S. 191, 199, 77 S.Ct. 281, 285, 1 L.Ed.2d 246 (1957). The conduct of the officers was hardly consistent with any concern for petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

In *Malloy* v. *Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 1494, —— L.Ed.2d —— (1964), the Court, speaking through Mr. Justice Brennan, said:

> "The American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently secured, and may not by coercion prove a charge against an accused out of his own mouth."
>
> * * * * *
>
> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence."

Petitioner testified that he answered the questions while he was giving the statement "the way I figured he wanted me to" (R. 287). He further testified (R. 287):

> "Well, in some things he'd ask me, 'Did it happen that way?' and I figured that's the way he wanted it to happen, so I said, 'Yeah.'"

This demonstrates that officer Morales was, in fact, author of these statements.

Nor was the Tuesday formal warning sufficient, in the light of the history of petitioner's interrogation. As Mr. Justice Douglas said in *Haley* v. *Ohio,* 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1947):

> "We cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain."

And, in *Haynes* v. *Washington,* 373 U.S. 503, 513, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513 (1963), the Court again dealt with the situation where formalized warnings were given:

> "Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness (by the defendant in his statement). Certainly, we cannot accord any conclusive import to such an admission. . . . "

These cases provide the background for the rule set forth in the Court's opinion in *Miranda* v. *Arizona,* —— U.S. ——, 86 S.Ct. 1602, 16—, —— L.Ed.2d —— (1966):

> "In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrim-

> ination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forego his Fifth Amendment privilege." 86 S.Ct. 1602, 1640.

See also *Davis* v. *North Carolina*, —— U.S. ——, 86 S.Ct. 1761, 1763, —— L.Ed.2d —— (1966), where this Court refused to infer a waiver of petitioner's rights from the record, which showed that Davis was repeatedly interrogated and that he denied the offense prior to the time he finally confessed.

The failure to apprise this defendant of his rights under the Fifth Amendment to the Constitution of the United States—to remain silent until and unless he should choose to speak—was but another circumstance which rendered his confessions involuntary under the Fifth Amendment to that Constitution, as extended to the states by the Fourteenth Amendment.

D. *Petitioner was never advised of his right to counsel, and was not represented by counsel during the interrogation or at the time the "confessions" were signed.*

The trial of this case was begun some six weeks prior to June 22, 1964, the date of this Court's decision in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977

(1964), and therefore, petitioner may not rely on that decision. *Johnson* v. *New Jersey,* —— U.S. ——, 86 S.Ct. 1772, 1781, —— L.Ed.2d —— (1966). In *Johnson,* however, the Court said at page 1779:

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing, of course, that the procedural prerequisites for direct or collateral attack are met . . . Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years . . . Thus, while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

And, in *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, 1764, —— L.Ed.2d —— (1966), this language appears:

> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that the defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness."

The Texas Court of Criminal Appeals distinguished *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) on the ground that petitioner had not requested counsel (R. 445). Despite the prospective application of the *Escobedo* rule, this holding is obviously in error. *Carnley* v. *Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Miranda* v. *Arizona*, —— U.S. ——, 86 S.Ct. 1602, —— L.Ed.2d —— (1966). Although the question is now moot, in the light of the decision of this Court in *Miranda* v. *Arizona*, —— U.S. ——, 86 S.Ct. 1602, —— L.Ed.2d —— (1966), and *Johnson* v. *New Jersey*, —— U.S. ——, 86 S.Ct. 1772, —— L.Ed.2d —— (1966), the circumstance that Marvin Clewis was not apprised of his right to counsel and was not represented by counsel at any time during the interrogation, gives weight to the involuntariness of all three confessions.

The Court of Criminal Appeals of Texas, in both its original opinion (R. 444) and its opinions on rehearing (R. 462, 473), makes much of the fact that Marvin Clewis "talked with a lawyer" during his confinement. The testimony is conflicting as to just when petitioner did talk with the attorney, H. S. Harris, Jr. Sgt. Morales testified for the state that petitioner talked with a lawyer on Thursday morning before being taken to the Department of Public Safety for the all-day interrogation which resulted in his subsequent confession there (R. 374, 388). Petitioner testified that he talked with the attorney after he had made the first two statements, but that the attorney did not represent him and did not give him any advice (R. 154-156, 314). Petitioner's sister testified that she asked the lawyer to go see the petitioner, but that the lawyer did not take petitioner's case and that she could not raise the money

to retain him (R. 422-423). The lawyer did not tell either the police or the sheriff's department at any time that he represented Clewis (R. 388, 236-237). Merely talking with a lawyer about his fee cannot serve as a substitute for advice about his rights.

If the lawyer had in fact represented petitioner, it is difficult to believe that he would have permitted the police to take him the same day to the Department of Public Safety and again subject him to a day-long interrogation —and yet this is what occurred, if the testimony of the officers is to be believed. The lawyer did not at any time take any steps to protect petitioner, he did not give petitioner any advice, and it is self-evident that he was not representing him. Petitioner's subsequent actions were not those of a man who was represented by an attorney, who had been given any advice, or to whom had been explained his constitutional right to counsel.

Petitioner did ask to "talk to someone" before giving any statement (R. 235). Gene Howell, the deputy sheriff who took the statement, testified (R. 235):

> "Q. All right, sir, did he make a request to you concerning a telephone call— A. Yes, sir.
>
> "Q. —to see someone? A. Yes, sir, he said he would like to talk to someone.
>
> "Q. What happened then? A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.
>
> "Q. All right, what happened? A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long-distance call to

that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time."

This same witness testified (R. 236) that petitioner did not have a lawyer, to his knowledge.

Failing to contact petitioner's "boss man" on the telephone, the deputy sheriff then called the district attorney, Mr. Mims, who came down and talked with petitioner (R. 233). This conversation certainly cannot be deemed as satisfying the constitutional requirement that petitioner be afforded counsel, nor can it by any stretch of the imagination serve to be considered a sufficient compliance with the requirement that petitioner's constitutional rights be explained to him.

We submit that, under this Record, it is obvious that petitioner's right to counsel was not explained to him and that he was never represented by counsel at any time prior to making these three confessions. It is uncontroverted in the Record that petitioner did not talk with counsel prior to the first confession. If the position be taken that Clewis was represented by counsel before the second or third confessions, then we submit that those confessions are void because counsel was not present when they were taken.

Moreover, petitioner was not represented by counsel at the preliminary hearing (R. 289). Legal aid and advice were most critical to petitioner in these circumstances at that hearing. Had an examining trial been demanded (as competent counsel would have done), petitioner would have been released and could not have been convicted, because the confession was undoubtedly inadmissible. At

the very least, the prosecution would have been required to disclose the contents of the first confession—a vital element in preparing petitioner's defense.

Had an examining trial been conducted, petitioner's counsel would have been entitled to cross-examine all of the witnesses. The fact of his arrest without probable cause would have been developed, and petitioner should have been discharged at any such hearing. Although this Court, in *Pointer* v. *Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, reserved the question as to whether or not the preliminary hearing in Texas is so critical to the defendant as to call for appointment of counsel at that stage, we earnestly submit that in this case legal aid and advice were most critical to petitioner. *Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 1202. The language of Mr. Justice Goldberg in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), is most applicable to describe petitioner's situation at the time of the examining trial:

> "It was a stage surely as critical as was the arraignment in *Hamilton* v. *Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114, and the preliminary hearing in *White* v. *Maryland,* 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193. What happened at this interrogation could certainly 'affect the whole trial,' *Hamilton* v. *Alabama, supra,* since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' Ibid. It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment.

> Petitioner had, for all practical purposes, already been charged with murder."

Substituting the words "examining trial" for the word "interrogation" in the above reference, makes this quotation apply with tremendous force to the situation in which Marvin Clewis found himself on Monday night. In these circumstances, if counsel had been appointed and had demanded an examining trial, petitioner would have been released and would never have been tried for the offense for which he now stands convicted. Under the rules set forth in *Miranda* v. *Arizona,* —— U.S. ——, 86 S.Ct. 1602, —— L.Ed.2d —— (1966), this question may be settled for the future. Petitioner, however, cannot take advantage of that decision.

Here was a most vital step in the proceedings against him when petitioner needed the "guiding hand of counsel" to protect him. *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Petitioner did not understand the proceedings, and testified, concerning his appearance before the Justice of the Peace (R. 116):

> "Q. What happened down there? A. Well, I don't know; signed some papers and read something off. I didn't understand it. They said they was charging me with murder with malice, or something, the way they had it.
>
> "Q. Do you remember whether or not the Justice of the Peace said anything to you—incidentally, was there a Justice of the Peace down there? A. I guess so; I don't know him.
>
> "Q. Well, anyway, the man in charge of it, did he say anything to you about whether or not you wanted

to waive an examining trial, or anything like that, or do you remember? A. No, sir, I don't remember if he did. He might have said it, but I don't remember that."

See also petitioner's testimony at R. 289. The state did not at any time establish that petitioner had waived an examining trial, and his testimony is not controverted in that respect. We submit that Marvin Clewis could not have intelligently waived an examining trial, and that he was clearly entitled to the help of a lawyer. He was entitled to be confronted with the witnesses, and with the contents of the statement, all of which could have been done if a lawyer demanded an examining trial as provided under the laws of Texas. Article 245, *Vernon's Texas Annotated Code of Criminal Procedure* (1925) provided, at the time of this trial:

"When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 250, *Vernon's Texas Annotated Code of Criminal Procedure* (1925) provides:

"If any person appear to prosecute as counsel for the state, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the state or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

And, Article 251, *Vernon's Texas Annotated Code of Criminal Procedure* (1925) provides that "The same rules of evidence shall apply to and govern the trial before an examining court that apply to and govern a final trial."

While we are unable to cite any case where a previous written statement has been introduced at an examining trial, it is obvious that the state could produce no other evidence at the examining trial which would authorize the magistrate to bind petitioner over to the Grand Jury on the charge which had been filed against him. According to Morales, the bones had not yet been identified as being the remains of Dorothy Mae Clewis (R. 173). There was certainly no evidence that death had been caused by any criminal agency, and there is no such evidence anywhere in this Record which existed either Monday night or to this very day. No information had been given to the police about any threats or the kind of trouble which Shirley Jean Judie and Rachel Garnett testified to at the trial. The state had no evidence other than the confession, and it necessarily would have been introduced.

Had counsel been present, he could have placed in the Record the testimony given at the trial showing that this defendant had been deprived of food and rest, had been physically assaulted, and had been subjected to prolonged interrogation and incommunicado detention. The fact of his illegal arrest without probable cause would have been established. Under those circumstances, we submit that the proper court could have and would have discharged this defendant. This was certainly "a vital step in the proceedings against him."

Later, in this Brief, we shall deal with the failure of the police to remand petitioner to the custody of the sheriff of

Midland County, Texas, as required by the warrant and by Article 261 and Article 264, *Vernon's Texas Annotated Code of Criminal Procedure* (1925), which provide:

> "After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and the facts of the case may require."
>
> "A commitment is an order signed by the proper magistrate directing a sheriff to receive and place in jail the person so committed . . . "

Petitioner would have received the further benefit of Article 265, *Vernon's Annotated Texas Code of Criminal Procedure* (1925):

> "Every sheriff shall keep safely a person committed to his custody. *He shall use no cruel or unusual means to secure this end,* but shall adopt all necessary measures to prevent the escape of a prisoner . . . " (Emphasis our own.)

Officer Morales testified (R. 389), that it was not the practice of Midland police officers to deliver the custody of a prisoner such as Clewis to the sheriff following the examining trial, even though the warrant commands that this be done, and Texas law requires it.

Had counsel been appointed for Marvin Clewis at this stage of the proceedings, Marvin Clewis would not be before this Court today. This was a very critical stage to Marvin Clewis.

E. ***Petitioner, following his arrest without a warrant and without probable cause, was not immediately taken before a magistrate as required by the laws of the State of Texas and by the Constitution of the United States. Petitioner was illegally detained and subjected to prolonged interrogation over a period of 38 hours following his illegal arrest, and had signed a confession prior to the time he was taken before a magistrate. Thereafter, the police officers detained him illegally, in violation of state law which required that petitioner be delivered to the custody of the sheriff of Midland County, Texas.***

Articles 212-215, *Vernon's Annotated Texas Code of Criminal Procedure* (1925), detail the instances in which a person may be arrested without a warrant, and Article 217, *Vernon's Annotated Texas Code of Criminal Procedure* (1925) provides:

> "In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

Officer Morales testified that he did not have a warrant when he took Clewis into custody at 6:00 A.M. Sunday, and that he knew that he did not have sufficient grounds to secure a warrant for his arrest (R. 170-171, 375). He testified that he had taken him to the police station for investigation of two Missing Persons Reports (R. 377-378), although Dorothy Mae Clewis had been reported missing nearly six months earlier (R. 377). Marvin Clewis lived in Midland for three months after that Missing Persons Report was filed, and was in Midland frequently—yet

officer Morales had never before contacted him. Petitioner was locked up at 8:00 A.M. on Sunday, according to the testimony of officer Morales (R. 172).

Petitioner had driven 300 miles and voluntarily gone to the sheriff's office at 11:30 P.M. the night before, where he was interrogated until about 2:00 A.M. (R. 56, 155). He was then released, but was told to come back to the sheriff's office the following morning (R. 57). Under these circumstances, there could have been no question that petitioner was "about to escape," and there was ample time to procure a warrant for petitioner's arrest (Article 215, *Vernon's Annotated Texas Code of Criminal Procedure,* 1925). Petitioner had committed no felony or breach of the peace in the presence of anyone, nor was he about to commit some offense (Articles 212, 213 and 214, *Vernon's Annotated Texas Code of Criminal Procedure,* 1925). Yet, officer Morales did not take petitioner before a magistrate until 8:00 P.M. Monday, 38 hours after he took him into custody (R. 173-174, 384, 419). He had been in continuous custody since his arrest (R. 174), and had been subjected to prolonged periods of interrogation on Sunday, Sunday night, and all day Monday beginning at 7:00 A.M.

Officer Morales testified that it was not the practice of the Midland Police Department to take a man directly to a magistrate (R. 385).

Had petitioner been taken immediately before a magistrate, no warrant would have issued for his arrest and he would have been discharged. On Sunday morning, there was absolutely no evidence which would have justified holding this petitioner. The deputy sheriff who interrogated him after his voluntary appearance Saturday night knew

this and released him, but asked him to come back the following morning to talk to the sheriff. Beyond any question, there existed no legal grounds upon which this defendant could be held in custody on Saturday night or at 6:00 A.M. Sunday morning when Morales got him out of bed and took him to jail. Petitioner would have been discharged by any magistrate. Knowing this to be true, officer Morales, nevertheless, decided to take the law into his own hands, and began the long in-custody interrogation and coercive conduct which resulted in the Monday night confession. Only then did they take petitioner before a magistrate.

This Court has long condemned the failure of an arresting officer to take his prisoner immediately before a magistrate, before any interrogation is commenced.

In *Ward* v. *Texas,* 316 U.S. 547, 552, 62 S.Ct. 1139, 1142, 86 L.Ed. 1663 (1942), this Court considered the Texas statutes requiring that any person arrested without a warrant be taken immediately before the nearest magistrate. The conviction was reversed because the officers did not comply with the law. In *Fikes* v. *Alabama,* 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957), the Court considered the fact that Fikes was denied the protections afforded to a prisoner upon a preliminary hearing under Alabama law, as a part of the "totality of the circumstances" which made his confession inadmissible. To the same effect, see *Reck* v. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Turner* v. *Pennsylvania,* 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810; *Haynes* v. *Washington,* 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

The law required that defendant be taken before a magistrate. This was not done. Had the law been complied with,

there would have been no confession because petitioner would have been discharged. He could then have consulted freely with family and friends and could have obtained legal counsel. Petitioner was illegally arrested, without probable cause, by an officer who had taken no part in the investigation of the case for which he was held and who was in possession of absolutely no facts which indicated any guilt on the part of petitioner. The essentials of a criminal offense had not been established, and the victim whose remains were found outside the city limits of Midland had not been identified. This combination of facts demonstrates the denial of defendant's constitutional rights in this case, and this is a compelling circumstance, illustrating the involuntary character of the confessions elicited from petitioner.

F. *Petitioner was physically assaulted, threatened, cursed and abused by the officers prior to making the first and second confessions, constituting a denial of due process.*

Each of the officers who testified in this case denied that any physical abuse had been inflicted on petitioner, or that any threats were made. Clewis testified that he was struck, cursed and threatened by the officers on Monday (R. 112-115, 282-285). Much of his testimony has been detailed at pages 17-18, 22 and 23 in the "Statement" portion of this Brief. He testified to being threatened Wednesday on the trip to Borger (R. 300-301), and while he was in Borger (R. 308). He further testified to being physically and verbally abused on Thursday (R. 125-126, 303-304), and testified that following such day-long abuse and questioning (R. 304):

"Well, I was tired and I just felt like I couldn't take no more, so I just went on and gave them a statement, and I was hurting so I didn't figure I had no choice."

The first confession was signed late Monday, and the second confession was signed late Thursday. Petitioner had denied any guilt on both those dates (R. 104, 105, 107, 125, 191, 197, 211, 269, 274, 276, 302, 317, 341).

Although he denied that he threatened petitioner, Ranger Wood would only respond that "I don't remember what I told him" (R. 188) on Monday and again on Thursday (R. 189).

There was corroborating evidence of petitioner's claim of physical abuse, cursing and threats on the parts of these officers. Deputy Sheriff Gene Howell testified that the petitioner told him that these same three officers—Sgt. Morales, officer Reid, and Ranger Wood—had assaulted him physically, threatened, and abused him (R. 95-96, 233-234). This witness testified that Marvin Clewis told him these things "reluctantly" (R. 96, 235). Wayne Taylor, assistant chief of police, testified that "There had some word got back to us that had been put out that he said he had been mistreated" even before the Thursday interrogation at the Department of Public Safety (R. 396-397). Taylor testified (R. 396) that Clewis told him on Thursday that he had not been mistreated. In addition, petitioner "acted like he was wanting to vomit, or acted kind of like he was sick" (R. 360), which corroborates his testimony that the polygraph operator "hit me in the stomach" and knocked him out of the chair (R. 304).

It is, of course, settled under the decisions of this Court that any sort of physical assault upon a prisoner is a denial of due process. *Brown* v. *Mississippi,* 297 U.S. 278,

56 S.Ct. 461, 80 L.Ed. 682. Mr. Justice Frankfurter wrote in *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957):

> "If this record had disclosed an admission by the police of one truncheon blow on the head of petitioner, a confession following such a blow would be inadmissible because of the Due Process Clause."

This principle is so well settled that citation of authorities is both tiresome and unnecessary. Although the testimony of physical abuse and threats is contradicted by the officers, petitioner's testimony appears in these circumstances to be very believable, when considered in context with the other undisputed circumstances of his treatment at the hands of the police. Particularly is this so when the testimony corroborating that abuse—which testimony was given by the state's witnesses—is considered.

This is but another of the many coercive circumstances which, taken together, render any confessions made by petitioner inadmissible because involuntary.

G. *Petitioner was moved from jail to jail and was incarcerated in one jail more than 300 miles from Midland, Texas; and in another building outside the city limits of Midland, Texas, in addition to the city police station, during the period of his incommunicado detention and prolonged interrogation.*

The practice of moving a prisoner during interrogation from jail to jail has been condemned by this Court. *Ward* v. *Texas*, 316 U.S. 547, 555, 62 S.Ct. 1139, 1143, 86 L.Ed. 1663 (1942); *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961).

Petitioner was confined in the city jail in Midland, Texas, from 6:00 A.M. Sunday until 7:00 A.M. Monday morning. He was then taken to the "grave" where the remains were found, and he testified that he was questioned at that place, which was two miles outside the city limits of Midland, Texas (R. 110). He was then taken to the Texas Department of Public Safety, which is outside the city limits of Midland, Texas, and was interrogated there all day. He was confined in a little room in which there was only one chair and an ashtray (R. 390-391). He was required to sit in that chair, and any interrogating officer would have been standing over him. On Wednesday, petitioner was taken from the police station at 6:55 A.M. (R. 188, 409). He was then driven by automobile to Borger, Texas, a distance of 300 miles (R. 188, 371, 409-410), in the company of Ranger Wood, officer Morales and a chemist for the Department of Public Safety, all of whom questioned him during the trip (R. 121, 365, 386, 414). This trip consumed the entire day, and Clewis was locked up in the Borger jail for a period of time (R. 300, 416). He was again taken from the police station and taken to the Department of Public Safety on Thursday morning, where he remained all day and was subjected to almost continuous interrogation.

In *Ward* v. *Texas, supra,* Mr. Justice Byrnes said:

> "The effect of moving an ignorant negro by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously is evident from petitioner's statement to County Attorney Rolston that he would be glad to make any statement that Rolston desired. Disregarding petitioner's claims that

> he was whipped and burned, we must conclude that this confession was not free and voluntary but was the product of coercion and duress, that petitioner was no longer able freely to admit or to deny or to refuse to answer, and that he was willing to make any statement that the officers wanted him to make."

The shuttling back and forth between the police station and the Department of Public Safety Building, the "ride out in the country" on which Morales testified he took Clewis Monday morning, and the trip to Borger and incarceration there are definitely circumstances to be considered in determining the voluntariness of petitioner's confessions. It is understandable why petitioner "didn't figure I had no choice" (R. 304) on Thursday and "it looked like the same thing happening all over again" (R. 153) when the Tuesday interrogation began.

2.

Petitioner's Confession Was Inadmissible and There Was a Denial of His Rights Guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States, When He Was Arrested Without a Warrant and Without Probable Cause by an Officer Who Possessed No Authority Over the Case and Was in Possession of No Facts Which Could Justify Petitioner's Arrest. Petitioner's Confessions Were the Fruits of Such Unlawful Arrest.

When police officer Morales woke petitioner at 6:00 A.M. on Sunday morning, July 8, 1962, and took him to the police station, he did not have a warrant for his arrest (R. 170-171, 375), and knew that sufficient grounds did not exist for him to have procured a warrant for his arrest. Officer Morales testified (R. 170-171):

"Q. And if you had wanted to see him, you would have come down here to somebody and gotten a warrant and gone out there and got him, wouldn't you? A. If I had sufficient grounds to get a warrant.

"Q. Why didn't you do that? Why didn't you get a warrant? A. I just answered that question."

As we have stated before, the human bones had been discovered three days previously, outside the city limits of Midland, Texas, at a place wholly outside the jurisdiction of the Midland Police Department (R. 43, 171, 376). The Midland County Sheriff's Department had begun and was pursuing its investigation, and no assistance from the city police or officer Morales had been requested (R. 43, 58, 171, 376). The bones had not yet been identified (R. 173), and there was no evidence that death had been caused by means of any criminal agency. Morales was in possession of no facts which connected petitioner with the crime, if in fact any crime had been committed.

Marvin Clewis had been working in Borger, Texas, a distance of 300 miles from Midland (R. 265). A deputy sheriff had left word with his sister that the sheriff's department would like to see Marvin Clewis if and when he arrived in Midland (R. 58). The deputy was aware that Clewis was working in Borger (R. 56). Elizabeth Johnson had called petitioner in Borger by long distance telephone on July 6 and told him that a body had been discovered and that there was some talk that it might have been Dorothy's body (R. 264). The next day, Saturday, when Clewis got in from work, his sister called him long distance from Midland and told him that the sheriff's department wanted to talk to him, whereupon petitioner changed clothes and left immediately for Midland (R. 265). After driving

300 miles, petitioner voluntarily reported to the sheriff's office about 11:30 P.M. and was questioned by a deputy sheriff, the witness Kirksey, until 1:30 or 2:00 A.M. Sunday (R. 55, 102). Deputy Kirksey testified that he told Clewis to go on home, but that he was to come back to the sheriff's office at 8:00 o'clock on Sunday morning (R. 57), doubtless aware that he had no evidence on which Clewis could be held.

After Morales took petitioner to the police station and locked him up early Sunday morning, he began the day-long interrogation which resulted in petitioner's agreement to take a polygraph test. No complaint was filed against petitioner, and he was held without a warrant and without being taken before a magistrate until 8:00 P.M. Monday (R. 174, 419). Without an examining trial, petitioner's bond was set and he was then returned to the police station instead of being delivered to the custody of the sheriff of Midland County, Texas, as the law requires (Articles 261, 263, 264, *Vernon's Annotated Texas Code of Criminal Procedure,* 1925). The officers continued to subject him to prolonged interrogation and incommunicado detention until the following Friday when, after having made two confessions in writing—which confessions were contradictory—he was finally delivered to the custody of the sheriff of Midland County, Texas (R. 231). He was also thereafter put in jail in Borger, Texas (R. 300, 416), and was incarcerated in both the city police station and at the Department of Public Safety Building outside Midland, Texas.

Articles 212-215, *Vernon's Annotated Texas Code of Criminal Procedure* (1925) enumerate the instances where

arrests may be made without a warrant. These statutes provide that arrest without a warrant may be made when a felony or offense against the public peace is committed in the presence of an officer or any other person; when a felony or breach of the peace has been committed in the presence of or within the view of a magistrate and such magistrate verbally orders the arrest; of persons found in suspicious places and under certain circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit an offense; and when it is shown by satisfactory proof to a peace officer, upon representation of a credible person, that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant.

None of these circumstances obtained here. The defendant had voluntarily driven 300 miles to talk to the deputy sheriff. He went directly to the sheriff's office when he arrived in Midland. There was no evidence of any kind to connect him with any offense. The bones which had been dug up had not yet been identified. Petitioner was not in suspicious places or threatening to commit any offense. There could be no question that he was about to escape, and there was ample time to have procured the issuance of a warrant for his arrest.

There was no justification for petitioner's arrest, and that arrest was made in violation of the laws of the State of Texas by an officer who prior to that time had not participated in any criminal investigation of the remains found northwest of the city and outside the city limits.

Undoubtedly, this arrest is condemned by Mr. Justice Brennan's language in *Wong-Sun* v. *United States*, 371

U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where this language appears (371 U.S. at 481-482, 83 S.Ct. at 414):

> "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Cf. *Jones* v. *United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed.2d 697. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy."

Certainly, officer Morales had taken the law in his own hands when he arrested petitioner on that Sunday morning. No warrant could have issued on the facts in his possession, and he was not entitled to transform "vague suspicion . . . into probable cause for arrest" by reason of his own conduct. As was said in *Wong-Sun* v. *United States, supra*:

> "That result would have the same essential vice as a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up."

By the same token, an arrest unlawful at its inception may not be validated by a confession later secured. Mr. Justice Brennan went on to say:

> "The history of the use and not infrequent use of the power of arrest cautions that a relaxation of the fun-

damental requirements of probable cause would leave law-abiding citizens at the mercy of the officers' whim or caprice. *Brinegar* v. *United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 . . . The threshold question in this case, therefore, is whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of Toy. We think that no warrant would have been issued on evidence then available" (371 U.S. at 479-480, 83 S.Ct. at 413).

When that test is applied to the facts in this case, it is obvious that no warrant could have issued for the arrest of Marvin Clewis. The officer himself knew this (R. 170-171) and nothing in the Record contradicts it. We have contended that the exclusionary rule of *Wong-Sun* vitiates any confessions which petitioner made following his unlawful arrest and illegal detention. The Court of Criminal Appeals, in its opinion of November 10, 1965 (R. 461), held:

"2. As we construe the opinion in *Collins,* it is not authority for the holding that *Wong-Sun* v. *U.S.,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407, is applicable to state court trials."

In its amended opinion overruling our Motion for Rehearing, dated January 5, 1966, the Texas court substituted the following paragraph for the one quoted above (R. 472):

"2. The decision of the majority in *Collins* was based on the involuntariness of Collins' confession as a matter of law. The resolution of Collins' claims with re-

gard to *Wong-Sun* v. *U.S.*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407, was attempted only by Chief Judge Tuttle, whose opinion also found the confession to be involuntary. Viewed in this light, we do not find *Collins* determinative of the appellant's claim under the exclusionary rule of *Wong-Sun*."

The Texas Court of Criminal Appeals was referring to the decision of the Fifth Circuit in *Collins* v. *Beto*, 348 F.2d 823 (5th Cir., 1965), in which both Chief Judge Tuttle and Judge Friendly held that the exclusionary rule of *Wong-Sun* applied to the facts in that case. Briefly stated, the facts were these: Collins was arrested at 7:30 P.M. on January 19 at his home, without a warrant. One of the officers testified that they "didn't feel justified in charging the man with an offense of that kind . . . on the basis of the information we had" (348 F.2d 823, 824-825). He was taken to Texas Ranger Headquarters in the same city, where there was no serious questioning. At midnight, he was taken to a jail in Humble, Texas, and charged with the offense of vagrancy. A complaint was filed and a warrant issued under a false name. Collins was placed in jail but was not questioned again until January 20 in the afternoon, when he was returned to Ranger Headquarters in Houston and the questioning began around 7:00 P.M. After interrogation consuming only one hour and fifteen minutes, Collins confessed orally. That confession was then reduced to writing, being completed about midnight. The officers found that statement unsatisfactory and in the early morning hours of January 21, they gave him two lie detector tests and questioning recommenced. Shortly thereafter he confessed again orally, and the second state-

ment was then reduced to writing. After signing it, he was taken before a justice of the peace and formally charged.

That case was decided prior to this Court's decision in *Beck* v. *Ohio*, 85 S.Ct. 223, 379 U.S. 89. The Court nevertheless held that the exclusionary rule of *Wong-Sun* applied in *Collins* v. *Beto*. Chief Judge Tuttle said (348 F.2d 823 at 827):

> "The only information offered as supporting Collins' arrest in this case, E. T. Morgan's 'tip', clearly does not meet the test, and the State law enforcement officers knew it. Even if Collins was not deprived of his constitutional rights when he was taken into custody at his home on the evening of January 19th, there can be no doubt that he was so deprived when he was locked up in the Humble jail based on a spurious vagrancy warrant in the name of 'Joe Smith.' Thus, the necessary predicate for the application of the exclusionary rule of *Wong-Sun* is indisputedly present in this case."
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> ". . ..I would hold that the evidence as to the manner in which Collins was taken into and held in custody was clearly sufficient to establish the prima facie inadmissibility of his post-arrest statements."
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> "It is clear that the confession obtained on the morning of January 21 was the 'target' of Collins' unlawful detention. Collins was kept in custody, not because the police had a legitimate basis for detaining him for as long as they did, but merely because his detention and questioning were aids in their 'investigation.'

Nor can the mere passage of time serve to 'dissipate the taint' of an unlawful arrest. If this were so, the police would be free simply to keep a suspect 'on ice' for a day or two before beginning an interrogation. This would postpone the tasting of the fruit but would not diminish its temptation." (Emphasis our own.)

* * * * *

"The taint of Collins' unlawful detention could not have been purged by the fact that he might have been warned *after he had completed his oral statement* and while officer Baker was preparing to commit this to writing, that he need make no statement. See *Killough* v. *United States*, 1962, 114 U.S. App. D.C. 305, 315 F.2d 241; 74 Harv. L. Rev. 1222-24 (1961). The reaffirmation of Collins' oral statement cannot be considered independent of that statement. There was neither a sufficient lapse of time, cf. *U.S.* v. *Bayer*, 1947, 331 U.S. 532, 541, 67 S.Ct. 1394, 91 L.Ed. 1654, (six months) nor a significant change in circumstances . . . Nor, I believe, would the taint be purged even if we were to hold the confession was 'voluntary.' See *Wong-Sun* v. *United States, supra*, 371 U.S. at 486, 83 S.Ct. at 417, n. 12."

In a separate concurring opinion in that case, Circuit Judge Friendly preferred to reverse the judgment on the "totality of the circumstances," rather than to resolve Collins' claims in regard to *Wong Sun* v. *United States, supra*. He did say, however (348 F.2d at 834-835):

"I thus follow Chief Judge Tuttle on the general proposition that *Wong Sun* prohibits the introduction in a state criminal trial of a confession that is the result

of an arrest violating the Fourth Amendment, just as *Mapp* prohibits the reception of an object obtained through an unconstitutional search."

Circuit Judge Friendly was reluctant to reverse on the grounds of *Wong Sun*, since the Supreme Court had not yet defined the limits of that doctrine.

In our briefs, we called to the attention of the Court of Criminal Appeals of Texas, Mr. Justice Stewart's opinion in *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223 (R. 451), where this Court said (379 U.S. 91, 85 S.Ct. 225-226):

"Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that petitioner had committed or was committing an offense. *Brinegar* v. *United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879; *Henry* v. *United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134."

* * * * *

"An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. . . . When the constitutional validity of an arrest is challenged, it is the function of a court to determine

> whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed. *Carroll* v. *United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543" (379 U.S. 96, 85 S.Ct. 228).

The exclusionary rule was applied to confessions which were the product of an unlawful arrest.

The Texas court distinguished the instant case from *Collins* v. *Beto, supra,* on the facts of the two cases. We submit that this distinction is not sound, because this Record shows a far more flagrant abuse of the power to arrest than was the case in *Collins.* The record demonstrated that Collins' two confessions did not follow "a long period of questioning by teams of officers," as the Texas court said (R. 462, 473) in this case. The Texas court also made much in its last two opinions of the fact that petitioner had not been questioned for three days prior to the time he made the third confession which was introduced in evidence. That court, therefore, attempted to draw a distinction by declaring that the "taint of the unlawful arrest" had been dissipated by the time the third confession was made.

We believe that this distinction, in these circumstances, has absolutely no validity. Petitioner was "afraid"; he "didn't think I could go through with the same thing that I had went through for three or four more days, and I had already made two statements, so I didn't figure it made any difference"; he had been threatened with another lie detector test and testified at the trial (R. 127):

"Q. Did you want to take another lie detector test? A. No, sir. I told him I wouldn't take narry another one."

Petitioner testified that the deputies and the district attorney did not mistreat him Tuesday morning before he gave the third confession (R. 151-152), but that he was scared to begin with, on that morning (R. 152). Although he began by denying any guilt at that final interrogation (R. 232, 306) and asked to "talk to someone" (R. 235), he finally gave in after the district attorney questioned him and he saw the pattern of events beginning to again take shape. He could "see it looked like the same thing happening all over again . . . and I didn't think I could take that no more" (R. 153).

The following testimony further reveals petitioner's state of mind at the time of the third confession (R. 307):

"Well, I had already been through that once, and those other officers told me the same thing, that nothing was going to happen to me, they wasn't going to do this and they wasn't going to do that, but they did, so they went and got Mr. Mims . . . so I was scared, because I figured the same thing that those officers done to me, that they would do the same thing; so I had already signed two statements and I didn't figure it made much difference . . ."

In *Ward* v. *Texas*, 316 U.S. 547, 552, 62 S.Ct. 1139, 1142, 86 L.Ed. 1663 (1942), this Court was confronted with a set of circumstances which, in many respects, parallel the facts in this case. This Court said:

"There can be no doubt that from first to last the officers acted without authority of law. The sheriff of Morris county had no authority to arrest petitioner in Titus county. Without the boundaries of Morris county he had no more authority than any private citizen. *Ledbeter* v. *State*, 23 Tex.App. 247, 5 SW 226; *Hooper* v. *Diesher*, Tex.Civ.App., 113 SW2d 966, 967. Nor did Constable Redfearn of Titus county have the right to take petitioner into custody. Under *Article 215* of the *Texas Code of Criminal Procedure*, the sheriff must procure a warrant before making an arrest unless he has been advised by a credible person that a felony has been committed and that the offender is about to escape . . . And *Article 217* provides that the person making the arrest must immediately take the person arrested before the magistrate, if the arrest is made without a warrant. Neither the sheriff of Morris county nor Constable Redfearn made any effort to secure a warrant. Instead of taking petitioner to the nearest magistrate, they took him away from the nearest magistrate. There was no pretense that the arrest had been made because of information that he was about to escape. He had been released Sunday after his first detention and on Tuesday evening he was attending a party at his church, when the sheriff of Morris county arrested him."

We believe that the facts in this Record call for the application of the exclusionary rule of *Wong Sun* and *Beck*. Each of these three confessions was the fruit of the illegal arrest, and the taint of that arrest was not dissipated by any conduct of the officers or by any other circumstances. To the contrary, the officers thereafter compounded the illegal detention by their coercive conduct.

Any confession—written or oral—which petitioner made after Morales placed him under arrest early Sunday morning should have been excluded from the jury, because of the circumstances of petitioner's arrest. The only warrant which was ever issued in this case was issued on the basis of his coerced confession late Monday. This in itself should vitiate any further confessions. The pressures attendant to the first two confessions were still operating when the third confession was signed.

3.

Refusal of the Trial Court to Require the State to Make Available to the Defense All Confessions Signed by Marvin Clewis Constituted a Denial of Due Process.

Petitioner's Motion to Require the State to Produce Confessions (R. 3-5) was overruled by the trial court. Petitioner contended that his counsel's knowledge of the content of these confessions was necessary to an adequate defense, and that the refusal of that Motion constituted a denial of due process. Petitioner was never permitted to see, inspect or use those writings at the trial. It thereby became impossible to demonstrate the inconsistencies in the three written statements by the best evidence available: the statements themselves. In order to get before the jury a picture of the coercive treatment of petitioner by the police and to show the inconsistencies of the written statements; it was necessary to cross-examine all of these witnesses for the state, without having the benefit of those writings. The difficulties of proceeding in that manner and the resulting prejudice to this defendant are readily apparent—yet this was the only procedure left to petitioner.

The purpose of the prosecutor is, of course, apparent. Knowing that there was evidence that the first two confessions were coerced, the state sought to get around this road-block by introducing only the third written confession in evidence. Had the jury been allowed to see all three confessions, the coercive conduct of the police would have been much more demonstrable by petitioner in his defense.

This is much more than a procedural question. In these circumstances, petitioner was denied a right guaranteed to him by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

As this Court said in *Dennis* v. *United States,* —— U.S. ——, 86 S.Ct. 1840, 1849, —— L.Ed.2d —— (1966), in an opinion by Mr. Judge Fortas:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C., Sec. 3500, responding to this Court's decision in *Jencks* v. *United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice."

While that case was concerned with federal procedural rules, and specifically with denial by the federal District Court of petitioner's motion to examine the Grand Jury minutes, we believe that denial of petitioner's motion in

this case amounted to a substantial deprivation of his constitutional rights.

It is unnecessary to cite the great number of cases in which this Court has held that matters of procedure are to be left to the states, and that this Court will not disturb that procedure. Yet, why is not the production of these confessions just as vital and just as substantial as arrest procedure, arraignment procedure, and the right of cross-examination? While petitioner at this point has not briefed this question as thoroughly as we would prefer to do—believing that the illegal arrest and the "totality of the circumstances" require reversal and exclusion of any confessions made by petitioner—we cannot escape the haunting conviction that any defendant, whether tried in a state or federal tribunal, is entitled to full "disclosure, rather than suppression, of relevant materials." While the author of this Brief assuredly does not hold himself kindred to the brilliant students and advocates of Constitutional Law in this country, we cannot shake the notion that a defendant convicted after such denial has been deprived of his liberty without due process of law. The right to disclosure should be extended to state trials.

Conclusion

For the reasons stated, petitioner has been denied due process and has been deprived of his rights under the Fourth and Fifth Amendments to the Constitution of the United States. Apart from the confession introduced in evidence as State's Exhibit 13 (R. 428-429), there is no evidence by which petitioner could have been convicted of the murder of Dorothy Mae Clewis. We have demonstrated

that there is nowhere in this Record any evidence that Dorothy Mae Clewis died (if, indeed the bones discovered northwest of Midland once comprised her frame), by means of any criminal agency. Petitioner had been married to her seven years, and was a hard-working man and a good husband, who had never before been in trouble with the law.

Because of the totality of the circumstances and his illegal arrest and detention, the confession introduced in evidence should have been excluded. Petitioner filed a motion to exclude and suppress those confessions, which was overruled by the trial court. The introduction of this statement calls for reversal of the conviction, together with findings which would forever bar the use of any statement made by him—oral or written—in any subsequent trial.

Petitioner respectfully urges upon the Court that the conviction which was affirmed by the Court of Criminal Appeals of Texas should be in all things reversed, and the case remanded for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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